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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

NORMAN L. FREEMAN,
REPORTER.

VOLUME 114.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN MAY, JUNE, SEPTEMBER AND NOVEMBER, 1885, AND SOME CASES IN WHICH APPLICATIONS FOR REHEARING WERE DENIED AT THE SEPTEMBER TERM, 1885.

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JOHN SCHOLFIELD,
JOHN H. MULKEY,
ALFRED M. CRAIG,
DAMON G. TUNNICLIFF,
SIMEON P. SHOPE,‡
} JUSTICES.

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CLERK IN THE CENTRAL GRAND DIVISION,
ETHAN A. SNIVELY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,
ALFRED H. TAYLOR, Ottawa.

---

* Mr. Justice MULKEY became Chief Justice at the June term, 1885.

† Mr. Justice DICKEY died in July, 1885, and Hon. BENJ. D. MAGRUDER was elected on November 3, 1885, for the unexpired portion of the term for which Mr. Justice DICKEY had been elected.

‡ Hon. SIMEON P. SHOPE was elected June 1, 1885, for the full term of nine years, as successor to Mr. Justice TUNNICLIFF.

JUDGES OF THE APPELLATE COURTS

DURING THE TIME OF THESE REPORTS.*

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LYMAN LACEY.

FOR THE THIRD DISTRICT—SPRINGFIELD:

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WILLIAM R. WELCH.

FOR THE FOURTH DISTRICT—MT. VERNON:

DAVID J. BAKER,
GEORGE W. WALL,
THOMAS S. CASEY.

---

* The terms of office of the judges above named having expired, the Supreme Court, at its June term, 1885, assigned the following named judges of the circuit court to duty in the Appellate Courts, in the several districts, respectively, for the term of three years:

For the First District—Joseph M. Bailey, William K. McAllister, Isaac G. Wilson.

For the Second District—Lyman Lacey, William R. Welch, David J. Baker.

For the Third District—George W. Wall, George W. Pleasants, Chauncey S. Conger.

For the Fourth District—Nathaniel J. Pillsbury, Jacob W. Wilkin, N. W. Green.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

114 11
130 641
114 11
138 390

JANE KAUFMAN

v.

THOMAS COOK.

Filed at Ottawa May 15, 1885.

1. SPECIFIC PERFORMANCE—*of a verbal promise to procure title and convey land—Statute of Frauds—making improvements without possession under the contract.* A person obtained a lease of a tract of land, and put his niece in possession thereof, under a verbal promise that if he succeeded in acquiring the title thereto he would give the same to her. She made some valuable improvements on the same, but it was *held*, that as she did not enter into possession under the agreement to convey, being a mere tenant at sufferance, the Statute of Frauds, which was interposed, was a bar to a bill to compel a conveyance from the promisor.

2. A vendor who, for a valuable consideration, enters into a verbal contract for the sale of premises to which he has no title, and who subsequently acquires the title, will be bound to specifically perform his contract when the purchaser has taken possession under it, and made valuable improvements thereon,—but not where he had no title when the possession was taken, and his promise was without consideration.

3. The possession of real estate must be taken under the contract of purchase, or agreement to give the same, to take the case out of the Statute of Frauds, and not be taken as a mere tenant. The entry must be under a binding contract, with one having title either in possession or expectancy.

4. TENANCY AT SUFFERANCE—*what so regarded.* Where one having no title to premises leases the same from the owner, and puts another in possession thereof under a promise to give to the latter the property in case he can acquire the title, the person so put into possession will occupy the position of merely a tenant at sufferance of the party having the leasehold interest.

APPEAL from the Circuit Court of Mercer county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. J. C. PEPPER, for the appellant:

A parol gift of real estate will be enforced whenever the donee has taken possession and made valuable and lasting improvements on the faith of the gift. *Young* v. *Glendenning*, 6 Watts, 509; *Mahon* v. *Baker*, 26 Pa. St. 519; *Ungley* v. *Ungley*, L. R. 4 Ch. 78; *Burkholder* v. *Ludcam*, 30 Gratt. 255; *Lobdell* v. *Lobdell*, 36 N. Y. 327; *Freeman* v. *Freeman*, 43 id. 35; *Bright* v. *Bright*, 41 Ill. 97; *Kurtz* v. *Hibner*, 55 id. 214; *Langston* v. *Bates*, 84 id. 524.

Messrs. BASSETT & WHARTON, for the appellee:

To enforce a parol contract for the conveyance of real estate, the evidence must be clear, certain and satisfactory. *Wallace* v. *Rappleye*, 103 Ill. 229; *Bailey* v. *Edmunds*, 64 id. 126; *Allen* v. *Webb*, id. 342; *Hartwell* v. *Black*, 48 id. 301.

The supposed donor could not give what he did not have, and a promise to make a gift of something thereafter to be bought, being by parol, could not be enforced. *Cassell* v. *Cassell*, 104 Ill. 361; *Galloway* v. *Garland*, id. 276; *Walton* v. *Walton*, 70 id. 142.

Possession was not taken under the gift. The act of taking possession must be such as can not be referred to any other title. 3 Washburn on Real Prop. 236; Fry on Specific Per. 176, sec. 387.

The use of the property was ample compensation for the improvements. *Walton* v. *Walton*, 70 Ill. 142; *Cassell* v. *Cassell*, 104 id. 361; *Bailey* v. *Edmunds*, 64 id. 128.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was a bill in chancery, filed by Jane Kaufman, in the circuit court of Mercer county, against Thomas Cook, the appellee, to compel the latter to convey certain real estate in pursuance of an alleged parol gift. The subject of the controversy is known to and designated by the witnesses as the "Atcheson property."

The bill charges, in substance, that appellee, who is the uncle of appellant, and without children, being displeased with the treatment the latter had received from the Stonier family, who were related to appellee by marriage, told her he would "give her a home;" that he would, for the time being, rent for her the Atcheson property, which was shortly afterwards to be sold, and if he could buy it when offered for sale he would deed it to her for a home for herself and children; that he accordingly did rent the property, subject to sale, and left a bid of $800 for it; that he got the property at his bid of $800, and obtained the title thereto; that he put the complainant in possession of the property, with the agreement that it should be hers and her children's forever, if he got the title; that she went into possession of said property, under the said promise and agreement, in April, 1882, and made lasting and valuable improvements on the same, under said agreement and promise; that she had the inside of the house altered, at an expense of from $25 to $30, built a stable at an expense of from $30 to $50, built and repaired fences at an expense of from $15 to $20, put a porch at the north end of the house, and made other lasting and valuable improvements thereon, and has resided on the property since April, 1882; that the defendant refuses to complete his gift by deed, and is trying to get possession of the property and oust her therefrom. The court, upon the hearing, rendered a decree dismissing the bill, and the present appeal is from that decree.

In the view we take of the case, it is not important to discuss the evidence in detail, or the claim that there is a variance between it and the allegations of the bill. It may be stated, in general terms, that we are of opinion that when the testimony is considered as an entirety, in the light of the relations of the parties and of all the surrounding circumstances, about which there is no controversy, it substantially sustains the bill.

The Statute of Frauds having been interposed by the answer, the question is presented whether proof of the facts alleged in the bill makes out a case of equitable cognizance not falling within the Statute of Frauds. As the property in question was not purchased by appellee until in May,—near a month after appellant had taken possession of it,—it follows that at the time of making the promise relied on, appellee had no title to the premises whatever, either legal or equitable, and this was well known to appellant. This being so, it is clear the entry of appellant was not under the title which she now seeks to obtain. On the contrary, it was under a mere license from one having a chattel interest, only. The leasehold was in appellee, and appellant's occupancy was that of a tenant at sufferance. She entered, therefore, solely upon the voluntary promise of appellee that he would, if he succeeded in acquiring it, convey to her a title which he did not possess, or even have a promise of. Nor did his promise to appellant impose any legal obligation on him whatever to purchase the property in question. Suppose he had withdrawn his bid of $800 for the property, and had not bought it at all, it will not be pretended appellant could have maintained an action against him for not doing so; and yet she unquestionably could, if what occurred created a valid contract between them. It is clear, therefore, appellant's entry was not under any binding contract or engagement with one having title, either in possession or expectancy, with which to connect her subsequent expenditures on account of

improvements, so as to take the case out of the statute. We do not desire to be understood as intimating, much less holding, that a vendor who, for a valuable consideration, enters into a verbal contract for the sale of premises to which he has no title, will not, on subsequently acquiring the title, be bound to specifically perform his contract where the purchaser has taken possession under it, and has made valuable improvements thereon. That he would be bound to do so under the circumstances stated, we have no doubt. But this is not a case of that kind. Here, the promisor not only had no interest in possession or expectancy, but his promise was without consideration, and the entry made under it was before anything had been done by the promisee to make it binding upon him. In such a case we are of opinion there is no ground for equitable relief.

The judgment will be affirmed.

Judgment affirmed.

ASAHEL GAGE

v.

ADLAI T. EWING.

Filed at Ottawa May 15, 1885.

1. FORMER ADJUDICATION—*dismissal of bill for reasons not affecting the merits—whether a bar to a subsequent suit.* The dismissal of a bill in chancery because of a defect therein, such as a failure to allege a matter essential to the jurisdiction of the court, is no bar to a second bill in which such defect is cured or obviated by further and sufficient allegations.

2. Thus, where the owner of land filed a bill to set aside a tax title as a cloud on his title, which failed to show that the land was in the possession of the complainant, or was unimproved and unoccupied, so as to give a court of equity jurisdiction, its dismissal by the court is no bar to a second bill brought for the same purpose by a purchaser of the complainant in the former bill, purchasing during its pendency, which alleges that the premises are vacant and unoccupied.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Mr. AUGUSTUS N. GAGE, for the appellant:

This suit was brought to remove as a cloud upon title the tax deed held by appellant, and that was the only object of the suit. This court has repeatedly held that chancery has jurisdiction for such purpose. The suit at bar is for precisely the same purpose, and none other, therefore the subject matter and the grounds for relief in the suit of *Gage* v. *Abbott* are identical, and the same as the subject matter and the grounds for relief in the suit at bar. *Thomson* v. *Morris*, 57 Ill. 333; *Theological Seminary* v. *Gage*, 103 id. 175; *Ohling* v. *Luitjens*, 22 id. 23.

A decree or order dismissing a bill upon its merits, where there is no direction that the dismission be without prejudice, is conclusive until reversed, and is a good plea in bar to a new bill for the same matter. 2 Story's Eq. Jur. sec. 1523; *Forte* v. *Gibbs*, 1 Gray, 412; *Garrick* v. *Chamberlain*, 97 Ill. 620.

Messrs. W. G. & A. T. EWING, for the appellee:

The dismissal of a bill which is so defective as to show no right to relief, is no bar to a second showing of a right. *Emory* v. *Keighan*, 88 Ill. 516.

In urging a former adjudication as an estoppel, the decree in the former suit must be as beneficial to the plaintiff as that which might be obtained in the second suit. 1 Daniell's Ch. Prac. 561, 633, 660.

A judgment upon a demurrer for a defect in the pleadings will not bar another action for the same cause. *Vallandingham* v. *Ryan*, 17 Ill. 25.

When, by a defect in pleading, the merits of an action or defence were not presented, a plea of former recovery will not be a bar to a second action. *Vallandingham* v. *Ryan*, 17 Ill. 25.

If the facts stated in a count being admitted or proved will not entitle the plaintiff to a judgment, a judgment for the defendant would not bar the plaintiff from suing again on the same contract. *Smalley* v. *Edey*, 19 Ill. 207; 3 Greenleaf on Evidence, secs. 35, 36; 2 Phillips on Evidence, chap. 2, sec. 2; 1 Chitty's Pleading, 198.

Judgment for defendant in ejectment, where it appeared at the commencement of the suit that the defendant was not in possession, will be no bar to another suit. *Oetgen* v. *Ross*, 54 Ill. 81.

Bigelow, in his work on Estoppel, (2d ed. page 21,) says: "Further, a judgment, in order to work an estoppel to another litigation, must have been rendered upon the merits. If the cause were dismissed upon some preliminary issue, as, upon a plea in abatement, the parties are at liberty to raise the main issue again, in any form they choose. * * * Judgment proceeds upon the merits when the original cause of action is decided upon."

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill in equity, by appellee, against appellant, to remove two tax deeds as clouds upon his title, upon grounds sufficiently set forth in the bill. Appellant filed two pleas, the first setting up that the land mentioned in the bill was unimproved and unoccupied at the time of filing the bill, and that, because thereof, appellee had a complete remedy at law in an action of ejectment; and the second setting up, that the complainant purchased the property in question during the pendency of a bill in equity filed by his grantor, against the appellant, for the same purpose as the present bill, that the former cause was brought to issue, and the bill dismissed for want of equity, and such former adjudication is set up in bar of this suit. These pleas having been set down for argument, were overruled by the circuit court, and

appellant electing to stand upon his pleas, a final decree was entered in favor of appellee. On appeal to this court, we held the circuit court properly overruled the first plea, but that it erred in overruling the second plea, and we remanded the cause to the circuit court for further proceedings consistent with that opinion. (*Gage* v. *Ewing*, 107 Ill. 11.) After the cause was remanded, replication was filed, and subsequently the cause was heard on bill, answer, proofs, etc., and the court decreed in conformity with the prayer of the bill, and this record is brought before us by appeal from that decree.

It appears that in this bill there is an allegation that the premises are unimproved and unoccupied, while in the bill set up in the second plea that allegation is wholly wanting; and the only question discussed upon this record is, whether, in the absence of that allegation, the suit set up in the second plea is a bar to the present suit. Our answer must be in the negative. When the suit set up in the second plea was before us, (*Gage* v. *Abbott*, 99 Ill. 366,) we held that because the bill failed to show that the complainant was in possession, or that the premises were unimproved and unoccupied, the decree of the circuit court granting the relief prayed for, was erroneous,—that one or the other of these allegations was essential to give the court jurisdiction. That bill not having been subsequently amended, but dismissed in conformity with our ruling, the decree therein can not be urged in bar of the relief sought by this bill. It contains the precise allegation because of the absence of which that bill was held to be defective. The dismissal of a bill because of some defect precluding relief, is no bar to a second bill in which such defect is cured, notwithstanding in other respects the material allegations are the same. *Emory* v. *Keighan et al.* 88 Ill. 516; 1 Daniell's Chancery Practice, (Perkins' ed.) 660.

The decree below is affirmed.

Decree affirmed.

ELLEN R. STEVENSON

v.

EDWIN A. CRAPNELL *et al.*

Filed at Ottawa May 15, 1885.

1. ESCROW—*effect of delivery to the grantee.* There can not be a delivery of a deed to the grantee *in escrow*. Such delivery makes the deed an absolute one to the grantee.

2. STATUTE OF FRAUDS—*reserving a verbal trust by a grantor.* An express trust between the grantor and grantee of land, that the grantee is to hold the land in trust for the grantor, or is to reconvey to him in a certain contingency, is invalid, under the Statute of Frauds, unless evidenced by some writing signed by the grantee.

3. RESULTING TRUST—*when it arises.* Where there is an express trust, there can not be a resulting or implied trust; and in case of a voluntary conveyance, no resulting trust can arise in favor of the grantor.

WRIT OF ERROR to the Circuit Court of Mercer county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. J. C. PEPPER, for the plaintiff in error.

MESSRS. BASSETT & WHARTON, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for partition of certain lands described in the bill, filed June 30, 1883, by Edwin A. Crapnell, against Ellen R. Stevenson and Emily J. Noble. The bill states that William B. Crapnell died December 15, 1881, seized of the lands, leaving complainant, his brother, and the defendants, his sister and niece, his sole heirs at law, and entitled each to one-third of the land. The defendants filed a joint answer, setting up the facts stated in the following bill. Ellen R. Stevenson had before, on March 7, 1883, filed her bill against Edwin A. Crapnell and Emily J. Noble, in which she stated

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that previously to June 29, 1877, she, and her brother, William B. Crapnell, and Emily J. Noble, were unmarried people, and had never left their home they had had with their parents; that on said 29th of June she was about to be married and go to the State of Texas, and thought she might never return to live at the old home, and desiring, if she never returned, that her brother, William B., should have the old farm and home, she made to him a deed of one hundred and twenty acres of the land which is described in this bill for partition; that the understanding and agreement between her brother and herself was, that if she never returned he was to own and hold the land, but if she returned from Texas to live at the old home, he was to give up the land and deed to her, and it was to remain her property; that no consideration was ever paid for the land; that shortly after making the deed she was married and went to Texas, and resided there until in July, 1878, when she returned to Illinois and to the old homestead, where she resided with her brother, William B., until his death, in December, 1881. The bill prayed for a decree for $1500, the consideration named in the deed, and that it be made a lien on the land. That bill became a cross-bill to the present bill for partition, by consolidation. The answer of Edwin A. Crapnell denies the allegation that William B. Crapnell had not paid for the land, and sets up the Statutes of Frauds and of Limitations, and *laches*.

The placing of the deed of Ellen R. Stevenson to William B. Crapnell in the hands of the latter, upon the condition that the deed was to take effect only in case the grantor remained in Texas, and that if she returned, the deed was to be delivered back to her and be of no force, was a delivery of the deed *in escrow*, and it is the well settled rule of law that there can not be delivery of a deed to the grantee as an *escrow*,—that such delivery makes the deed an absolute one to the grantee. *Neely* v. *Lewis*, 5 Gilm. 31; 3 Washburn on Real Prop. 267, and cases cited in notes.

Whatever of condition or understanding there was as to William B. Crapnell holding the deed or land, was verbal, only, and so far as there might be supposed to arise therefrom any trust, it was an express trust, which would be invalid because of not being manifested by some writing, signed by the party declaring the trust. (Rev. Stat. 1874, chap. 59, sec. 9.) Where there is an express trust, there can not be a resulting or implied trust. (*Kingsbury* v. *Burnside*, 58 Ill. 310.) A voluntary conveyance can not be held to create a resulting trust for the grantor. *Jackson* v. *Cleveland*, 15 Mich. 94.

There was no purchase of the land by the grantee,—no agreement by him to pay anything for the land,—and there was no indebtedness for it on his part, and thus there can not be any vendor's lien.

The decree of the circuit court ordering partition and dismissing the cross-bill, must be affirmed.

Decree affirmed.

ELMER W. ADKINSON

v.

THOMAS GAHAN *et al.*

Filed at Ottawa May 15, 1885.

1. APPEAL—*right of parties to dismiss an appeal by agreement.* The appellant in this court may dismiss his appeal at his own costs, when the suit brought by him is not one to enforce a public right.

2. In this case the appellant filed his bill in equity as a citizen and taxpayer of the town of Lake, to restrain the trustees of the town from making payment to one of their number, the supervisor of the town, of two per cent on all moneys coming into his hands for the fiscal year 1884-85, which was dismissed on demurrer, and he brought the case to this court by appeal, and during the pendency of the appeal moved the court to dismiss the same, on stipulation of the parties that it should be dismissed, and the motion was allowed.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This was a bill in equity, filed by the complainant, as a citizen and tax-payer of the municipality, to restrain the defendants, as trustees of the town of Lake, from making payment to one of their number, Thomas Gahan, the supervisor of the town of Lake, pursuant to the following resolution: "*Resolved*, that the treasurer of the town of Lake be and he is hereby allowed two per cent on all moneys coming into his hands during the fiscal year 1884-85, and that he report to this board, monthly, the receipts and disbursements on hand, less commissions."

The bill showed that the town of Lake is a municipal corporation, incorporated under an act of the General Assembly entitled "An act to revise the charter of the town of Lake, in the county of Cook," approved March 26, 1869, (Private Laws of 1869, vol. 4, p. 324,) and as changed and amended by the constitution of the State, adopted in 1870, and the several acts of the legislature which apply to said town of Lake, and are amendatory of its charter. The court below sustained a demurrer to the bill, and dismissed the same, and as the case involved a construction of section 11, of article 10, of the constitution, and the validity of the act of 1869, an appeal was taken directly to this court.

Mr. ELMER W. ADKINSON, *pro se*.

Mr. J. B. THOMAS, and Messrs. A. H. & J. L. VEEDER, for the appellees.

Per CURIAM: Upon motion of the appellant, supported by a stipulation signed by the parties to the record, this appeal is dismissed at the costs of the appellant. Since the motion and stipulation were filed, an affidavit of certain citizens of the town of Lake who are interested in the questions involved

in the litigation, has been filed in opposition, and we are asked, therein, to deny the motion. The affidavit states that the stipulation to dismiss is the result of a collusive and fraudulent agreement between the parties.

It must be borne in mind this is not a suit to enforce public rights, but one in which the rights of private parties (*i. e.*, those to the record,) are alone concerned. The interest of the public is purely incidental,—an interest in the settlement of a legal principle,—just as may happen in any suit between private parties. But in all such cases any other party is at liberty to commence a suit and litigate the same question, if the suit first brought be dismissed before it is there settled. No one but the parties to the suit is liable for the payment of the costs, or directly affected by the result of the dismissal. Suppose we were to overrule the motion, who is responsible for the additional costs that may be incurred? No indemnity is given, or could legally be required to be given, the appellant, against the additional costs. We are aware of no practice by which a party can be compelled to continue the prosecution of a private suit against his will and at his own expense. If, while the suit was pending, it had been alleged and proved that the suit was collusive, we would have dismissed it, promptly, out of court. But ceasing to prosecute an appeal,—ceasing to ask the aid of a court,—is a different thing.

Any party who wishes to re-litigate the questions involved in this record is at perfect liberty to do so. No one was under obligation to await the issue of this litigation for a settlement of those issues, and no one has any vested right in the appeal of the appellant.

The appeal is dismissed.

Appeal dismissed.

Syllabus.

MICHAEL SULLIVAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 15, 1885.

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1. CRIMINAL LAW—*of the venue—sufficiency of proof.* On a trial for robbery, while no witness testified directly that the offence was committed in Peoria county, but the evidence showed that it was committed on W. street, in Peoria, Illinois, it was *held*, that this was sufficient to show the offence was committed in Peoria county, Illinois.

2. SAME—*accused as a witness in his own behalf—of the consideration to be given to his testimony—tests of credibility, etc.* On the trial of two persons on the charge of robbery, two witnesses testified in behalf of the prosecution, and the two defendants testified in their own behalf, the four being present at the time of the alleged robbery. The court instructed the jury, as to each defendant, "that while the defendant is by law a competent witness in his own behalf, yet his credibility, and the weight to be given to his testimony, are matters exclusively for the jury to pass upon; and while they should not disregard his testimony through mere caprice, yet the jury are not bound to believe him, nor are they bound to treat his testimony the same as the testimony of other witnesses, but they may take into consideration the fact that he is the defendant, and his interest in the result of the case, as such, and give his testimony such weight as, under all the facts and circumstances in evidence in the case, they may think it is entitled to:" *Held*, that the instruction was erroneous in telling the jury they were under no obligation to treat the defendant's evidence the same as the testimony of other witnesses.

3. In a criminal prosecution, the accused, as a witness in his own behalf, differs from other witnesses only in the fact that he is the defendant, charged and being tried for crime, which may be taken into consideration by the jury in passing on his credibility. But his testimony must be treated the same as any other witness.

4. In such case, the interest of the accused in the matter of the prosecution, and his desire to shield himself from punishment, may properly be considered by the jury in passing upon his credibility, and his evidence may be subjected to all the tests resorted to in order to elicit truth from an unwilling witness; but where the evidence has undergone all these tests, then it is to be treated the same as the evidence of other witnesses.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. N. M. Laws, Judge, presiding.

Mr. DANIEL R. SHEEN, for the plaintiff in error:

The fourth instruction given for the People tells the jury that while they have no right to disregard the testimony of defendant through mere caprice, they are not bound to believe him, nor to treat his testimony the same as that of other witnesses. This instruction goes further than any yet sanctioned by this court, and if it embodies the law, the presumption of innocence is supplanted by one of guilt, and while the jury can not disregard testimony through mere caprice, they may disregard it on account of the interest of the witness. His credibility is to be tested as that of any other witness. *Chambers* v. *People*, 105 Ill. 410; *Higgins* v. *People*, 98 id. 519; *Bulliner* v. *People*, 95 id. 396; *Creed* v. *People*, 81 id. 569; *Hirschman* v. *People*, 101 id. 568.

It is not sufficient that the instructions given for the defendant upon the same point, state the law correctly. The jury would have as much right to follow one instruction as the other. *Steinmeyer* v. *People*, 95 Ill. 390.

Proof of the venue was easy, and a failure to prove it, fatal to the conviction. *Satler* v. *People*, 59 Ill. 68; *Jackson* v. *People*, 40 id. 405.

Mr. J. M. NEIHAUS, and Mr. GEORGE HUNT, Attorney General, for the People:

The fourth of the People's instructions differs materially from the one condemned in *Chambers* v. *People*, 105 Ill. 410. The jury, being the judges of the credibility of the witnesses, were not bound to believe the testimony of this or any other witness any further than such testimony, when tested by the rules of evidence, commended itself to them as true, and it was not error to so instruct the jury. *Hirschman* v. *People*, 101 Ill. 568; *Gainey* v. *People*, 97 id. 270.

No question was raised as to the venue, in the court below.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

Michael Sullivan, the plaintiff in error, was indicted in Peoria county, jointly with Frank Schroeder and Thomas Smith, for robbery of a watch from Peter Miller, on November 23, 1884. Schroeder obtained a separate trial. Smith and Sullivan were tried together, and the jury acquitted Smith, but convicted Sullivan, and he sued out this writ of error.

Whether Sullivan was guilty of the crime for which he was indicted, was a question purely for the determination of the jury, and had the instructions of the court conformed to the law, so that it could be seen that defendant had received a fair and impartial trial, we would not regard it our duty to disturb the judgment. But we are not satisfied that the instructions given on behalf of the People presented the law involved in the case fairly before the jury. The fourth instruction given for the People was as follows:

"The court further instructs you, as to each defendant, that while the defendant is by law a competent witness in his own behalf, in this case, yet his credibility, and the weight to be given to his testimony, are matters exclusively for the jury to pass upon; and while they should not disregard his testimony through mere caprice, yet the jury are not bound to believe him, nor are they bound to treat his testimony the same as the testimony of other witnesses, but they may take into consideration the fact that he is the defendant, and his interest in the result of the case, as such, and give his testimony such weight as, under all the facts and circumstances in evidence in the case, they may think it is entitled to."

Four witnesses were sworn, and testified in the case before the jury. Miller, who claimed to have been robbed, and Logan, one of the four young men who were alleged to have been with the defendants and connected with the crime, testified in behalf of the People, while the two defendants testified in their own behalf. It will thus be seen the two witnesses

for the People, and the two defendants who testified in their own behalf, were all present when the alleged crime was committed, and all had the same knowledge of the facts as they occurred. It was therefore a matter of the highest importance, so far as the rights of the defendants were concerned, that the jury should be correctly instructed in reference to the weight to be given to the evidence of the defendants, as it is plain, if the jury were led to believe, by the instructions of the court, that the evidence of the defendants was not to be regarded in the same way as that of other witnesses, little or no regard would be given such evidence, and conviction would follow as a matter of course. As will be observed, the fourth instruction, *supra*, informs the jury in plain words that they are under no obligation to treat the evidence of the defendants the same as the testimony of other witnesses. An instruction of this character was condemned in *Chambers* v. *The People*, 105 Ill. 409, where it was held that the accused, as a witness, differs from other witnesses only in the fact that he is the defendant, charged and being tried for crime, which may be taken into consideration by the jury in passing on his credibility, but his testimony must be treated the same as that of any other witness. The case seems to be directly in point, and conclusive of the instruction. Where a defendant testifies in his own behalf, his interest in the case,—his desire to shield himself from punishment,—may properly be considered by the jury in passing upon his credibility, and the evidence may be subjected to all the tests resorted to, in order to elicit truth from an interested witness; but when the evidence has undergone all of these tests, then it is to be treated the same as the evidence of other witnesses. The instruction, under the evidence before the jury, was calculated to mislead, and probably did mislead, the jury.

It is also claimed the evidence did not show that the alleged crime was committed in Peoria county, and upon this ground the judgment is erroneous. No witness testified directly that

the offence was committed in Peoria county, but the evidence is that the offence was committed on Washington street, in Peoria, Illinois. If the offence was committed in Peoria, Illinois, as Peoria is in Peoria county, the venue was sufficiently proven.

Other questions have been raised, but it will not be necessary to consider them.

We are of opinion that the court erred in giving the fourth instruction for the People, and for this error the judgment will be reversed and the cause remanded.

Judgment reversed.

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HERBERT S. GILBERT & Co.

v.

PATRICK McGINNIS *et al.*

Filed at Ottawa May 15, 1885.

1. CONTRACT—*right to rescind for refusal to comply with terms except upon new conditions.* Where a purchaser of a lot of corn to be delivered to him at a future time, agrees, as a part of the contract of sale, to make such advances from time to time as the seller may require, if the purchaser refuses to make an advance when demanded, except upon condition that the vendor shall give his note for the amount, the seller may rescind the contract, and refuse to deliver the corn.

2. SAME—*custom, usage—how far admissible to explain or vary terms of contract.* Where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intention of the parties, and to aid the court in arriving at the true construction of the contract, is admissible in evidence.

3. Evidence of a particular custom or usage of trade is also admissible, for the purpose of engrafting, as it were, new terms into a contract, subject, however, to the qualification that such terms are not expressly or impliedly excluded by the express agreement. To have this effect the custom or usage must be reasonable, and not in conflict with any general rule of law.

4. But it is not admissible to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself. Such evidence is never admitted to vary or contradict, either expressly or by implication, the terms of an agreement, written or verbal.

5. In February a person agreed to sell to another a quantity of corn at a stipulated price per bushel, to be delivered in the months of August and September following, and the purchaser, as a part of the same agreement, promised to make advances on the contract to the seller of what money he might, from time to time, require. It was *held*, in a suit upon the contract brought by the purchaser for non-delivery of the corn, that evidence that a custom or usage prevailed requiring the vendor to give to the vendee his note upon receiving any such advances, was not admissible in behalf of the plaintiff, as it was inconsistent with the express contract.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. BULL, STRAWN & RUGER, for the appellants:

On entering into a commercial contract, it is presumed that the parties made it in view of the known usage and custom which relates to that branch of trade. *Insurance Co.* v. *Advance Co.* 80 Ill. 549; *Doane* v. *Dunham*, 79 id. 131.

A person dealing in a particular market must be taken to deal according to the known, general and uniform custom or usage of that market. *Bailey* v. *Bensley*, 87 Ill. 556; *Pennsylvania Co.* v. *Stoelke*, 104 id. 201.

This is true unless the custom is inconsistent with and directly opposed to the express terms of the contract. Custom may even give the contract a different interpretation than would otherwise be given to its clearly expressed terms. *Insurance Co.* v. *Favorite*, 46 Ill. 263.

The contract is presumed to have been made in reference to existing usage or custom relating to the grain trade, and it was competent to resort to such usage to ascertain and fix the terms of the contract. *Lonergan* v. *Stewart*, 55 Ill. 44.

That the custom of requiring notes for advances was general and universal, and therefore well known in this market, we offered to show, but were not permitted. We think this proof was proper and competent. 1 Powell on Contracts, 272, 273, 384; 2 id. 41; Chitty on Contracts, 112; *Insurance Co.* v. *Advance Co.* 80 Ill. 549.

Unless making advances was a condition precedent, a failure to make the same furnished no ground for rescinding, but gave only a right of action. *McKee* v. *Ritter*, 5 Gilm. 315; *Barruso* v. *Madan*, 2 Johns. 145; 2 Parsons on Contracts, 677.

Messrs. DUNCAN & O'CONNOR, for the appellees:

Every element of this contract was expressed, and no necessity existed for invoking any of the rules of law or customs of business for the interpretation of ambiguous features, or supplying omitted details. The promise to deliver corn was dependent upon the promise to make advances, and a refusal to make advances authorized the vendor to rescind.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

On the 16th of February, 1881, Patrick McGinnis, the appellee, sold to the appellants, Herbert S. Gilbert & Co., seven thousand bushels of corn, at thirty-nine cents per bushel, to be delivered in the months of August and September following. As a part of the same agreement the appellants promised to make advances on the contract to appellee of what money he might, from time to time, require. A short time after the making of this agreement, appellee called on the appellants, at their business house in Ottawa, and requested an advance on the contract, as per agreement. The clerk in charge of their business told him he could have the money, and commenced writing a note for the amount, whereupon appellee stated to the clerk he would not sign a note, remarking, in effect, that if he wanted to obtain money in that way

he could get it from the bank. Appellants refused to make the required advance unless appellee would give his note for the amount. This he declined to do, and informed the clerk at the time he would not let appellants have the corn. The corn not having been delivered within the time specified in the agreement, the appellants, on the 3d day of October, 1881, commenced an action of assumpsit, against appellee, in the circuit court of La Salle county, to recover damages for the non-delivery of the corn, which resulted in a judgment in favor of the defendant, for costs. This judgment having been affirmed by the Appellate Court for the Second District, the plaintiffs appealed to this court.

On the trial the plaintiffs offered to show there was a general custom among grain merchants to take notes from the seller for the amount of advances made under contracts for the sale of grain, like the one in question. They also proposed to prove that on previous occasions there had been contracts and dealings similar in character to the one sued upon, and that the manner of dealing between the parties was, when an advance was made, memoranda or notes should be taken for the money advanced. The court declined to admit evidence to the jury in support of either of these positions, and the ruling of the court in this respect presents the only question for determination. The same question is raised by certain refused instructions asked on behalf of the appellants.

The rule is well recognized that where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circumstances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intentions of the parties, and to aid the court in arriving at its true construction, will be admissible in evidence. Such evidence is not only admissible for the purpose of explaining the terms of a contract, but also for the purpose of ingrafting, as it were, new terms into it, sub-

ject, however, to the qualification that such new terms are not expressly or impliedly excluded by the express agreement. (1 Smith's Leading Cases, *307, *et seq.*) To have this effect, however, the usage must be reasonable, and not in conflict with any general rule of law. (*Macy et al.* v. *Wheeling Ins. Co.* 9 Metc. 354.) The proof offered in this case was clearly not for the purpose of explaining any ambiguity in the contract, or for the purpose of showing that some particular word or phrase in it is used out of its ordinary signification. No claim of this kind is made. It is conceded by both parties that appellants were to make advances,—that is, let appellee have money, from time to time, as he might need it, under the contract. So far there is no controversy. But appellants contend that a custom or usage prevailed, not adverted to in the express agreement, which required the appellee to give to them his note upon receiving any such advances. The usage here sought to be shown, it is clear, was for the purpose of adding a stipulation on the part of appellee which, it is conceded, is not found in the express agreement. This, as we have already seen, may sometimes be done; but whether it could be done in this particular case depends upon whether the stipulation thus to be added is inconsistent or in conflict with that part of the agreement which is expressed, and about which there is no controversy. We are clearly of opinion that it is, and that the trial court therefore ruled properly in excluding the evidence and in refusing the instructions complained of.

An advance or payment of money on a contract of sale, without doubt, is altogether a different thing from that of obtaining money from the purchaser on the seller's own note. The legal effect of the transaction in the first case is to extinguish, *pro tanto*, the seller's claim and the purchaser's corresponding liability. In the second, no part of either is extinguished. Instead of collecting something on his corn, as provided by the agreement, the seller is offered a loan of

money on his individual note, which would be a complete change of the legal relations of the parties. Whereas the seller was, before, a mere creditor of the purchaser, he at once, upon giving such a note, becomes the debtor of the purchaser, and no part of the debt due him on account of the sale is thereby discharged. Thus it is seen the legal effect in the one case is practically the very opposite of what it is in the other, and might in many cases result in the grossest injustice. For instance, had appellee given his note for the required advance, the appellants might, the next hour thereafter, have transferred it to another for value, and appellee would have been compelled to pay it, whether he ever got a cent for his corn or not. This is apparent. That one will not be permitted to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself, will hardly be questioned. This is not only the universally received doctrine on the subject, but it has been often fully recognized by this court. *Cadwell* v. *Meek*, 17 Ill. 220; *Bissell* v. *Ryan*, 23 id. 566; *Deshler* v. *Beers*, 32 id. 368; *Wilson* v. *Bauman*, 80 id. 493. In the editor's note to *Wigglesworth* v. *Dalleson*, Smith's Leading Cases, 309, it is said: "Evidence of usage, though sometimes admissible to add to or explain, is never to vary or to contradict, either expressly or by implication, the terms of a written instrument,"—citing in support of the proposition, *Magie* v. *Atkinson*, 2 M. & W. 442, *Adams* v. *Worldley*, 1 id. 374, *Freeman* v. *Loeder*, 11 A. & E. 589, and *Gates* v. *Pym*, 6 Taunt. 445. The rule here stated is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case.

It follows from what we have said, and the authorities cited, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Syllabus.

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THE PEOPLE *ex rel.* Charles P. Swigert

v.

THE GOLDEN RULE *et al.*

Filed at Ottawa May 15, 1885.

1. QUO WARRANTO—*by Auditor against insurance company—nature of the proceeding, as a private or public prosecution.* The Auditor of Public Accounts is given, by statute, supervision over life as well as other insurance companies; and when companies assume to insure without having sufficient legal authority, it is within the line of his duty to cause them to be prosecuted, and to be deprived of their assumed franchises. An information in the nature of a *quo warranto*, filed by the Attorney General on the relation of the Auditor, against a private corporation assuming to insure, is not a private but a public prosecution. In this regard, such a case is not analogous to that of *The People ex rel.* v. *North Chicago Ry. Co.* 88 Ill. 538. There the application was by a private party to file an information, while here it is by the Attorney General, at the instance of the Auditor of Public Accounts, in the performance of his duties as a public officer.

2. SAME—*leave to file information without a rule nisi.* Under the present statute the court, or judge thereof in vacation, may act upon the petition of the relator for leave to file an information in the nature of a *quo warranto*, without first laying a rule upon the respondents to show cause against granting the leave, and, if satisfied that there are probable grounds for the filing of the petition, allow it to be filed.

3. SAME—*proceedings after leave granted—power of the court to vacate the order granting leave—upon what grounds.* Where a circuit court, in term time, allows an information in the nature of a *quo warranto* to be filed, and orders a summons to be issued, the discretionary powers of the court are exhausted, and the issues of fact or of law presented by the pleadings must then be tried. If the information is insufficient, the respondents should demur, otherwise they should, by plea, set up any defence they may have.

4. If leave to file the information is granted, and an order made by the court for the issue of summons, upon a misapprehension of some fact material to be known before making such order, but for the supposed existence of which it would not have been made, it is competent for the court to vacate the order at any time during the term at which it is made.

5. Where the court has, on a proper affidavit showing probable cause, granted leave for the filing of an information by the Attorney General, it will be error to vacate the order granting leave for reasons or grounds which should be interposed as a defence on the final hearing.

Statement of the case.

6. LIFE INSURANCE—*when in the nature of a wager.* It would seem that a policy or certificate for the payment of a premium to one who may hold a number next to that held by the one who dies, and solely because he does die, makes the transaction in the nature of a wager upon the life of one in whom the party thus benefited has no interest, and is therefore illegal.

7. POWERS OF JUDGE *in vacation.* A judge of a circuit court in vacation can make orders only to the extent the statute authorizes him to do. The statute is the measure of his authority in vacation. He can enter no general orders, and can render no judgment in vacation, merely by virtue of his general powers as judge.

APPEAL from the Circuit Court of Warren county; the Hon. JOHN J. GLENN, Judge, presiding.

On the 6th of January, 1885, the Attorney General entered a motion in the Warren circuit court for leave to file an information in the nature of a *quo warranto,* in the name of the People of the State of Illinois, on the relation of the Auditor of Public Accounts, against the "Golden Rule," O. S. Barnum, T. S. Stamps, J. H. Wallace, John Troutman and W. B. Young, and in support of the motion he filed the following affidavit:

"Charles P. Swigert, being duly sworn, upon oath deposes and says that he is Auditor of Public Accounts of the State of Illinois, and has been for one year last past; that as he is informed and believes, O. S. Barnum and others filed in the office of the Secretary of State of the State of Illinois, on the 21st day of February, 1884, a certificate signed and acknowledged, and proposing to organize a body corporate, not for pecuniary profit, under an act concerning corporations, in force July 1, 1872, and that on said February 21, 1884, said Secretary of State issued his certificate, under his hand and the great seal of State, declaring the said corporation duly organized under the name 'The Golden Rule.' O. S. Barnum, J. H. Wallace, T. S. Stamps, John Troutman and W. B. Young were elected as directors to manage and control the business of its corporate existence, and they accepted

said office and entered upon the performance of its duties. Affiant is informed, and understands from information furnished him by the officers of said association, that the real and actual business of said corporation, as carried on by and under the direction of said directors since its organization, is, and has been, to solicit and receive applications for membership in said corporation, and to grant to such persons as were and are accepted as members, a certificate, which, together with the rules and regulations of said corporation, bound it, upon the death of a member, to serve notice of such death upon the surviving members thereof, and to make collections of money, or receive contributions from the surviving members, and to pay out seventy-five per cent of the money so received, not exceeding $1500, to a person named therefor in the deceased member's application, and twenty-five per cent thereof to the two persons who hold or held valid existing certificates of membership in said corporation, number next above and below the number of the certificate held by the deceased member.

"As further and more fully illustrating the manner of doing business, and the kind of business done by said corporation, affiant attaches hereto, and refers to, a blank form of application for membership, and marked 'Exhibit A.' Also blank form of certificate, marked 'Exhibit B.' Also book of constitution and by-laws of said corporation, marked 'Exhibit C.' All of which papers and exhibits were received by me from the officers of said corporation, as illustrative of the business done by it. [Signed] CHARLES P. SWIGERT."

A sufficient *jurat* is attached. It is not deemed necessary to set out the exhibits.

The court allowed the motion, and thereupon the Attorney General filed the following information, omitting the caption:

"James McCartney, Attorney General of the State of Illinois, who sues for the People of the State of Illinois, comes

now, etc., and at the relation of Charles P. Swigert, Auditor, etc., gives the court to understand (setting forth in detail the organization of the 'Golden Rule,' as shown by the preceding certificate, its objects, the election of officers as therein shown, and that said corporation and its said officers entered upon the exercise of their respective powers,) and that February 21, 1884, said corporation, under the direction of said directors, unlawfully solicited and received applications for membership therein; that by the rules of said corporation each member was required to pay five dollars for his admission to membership, also a semi-annual fee of fifty cents, and to make payments upon the death of a member, from which is established a fund denominated by said corporation a beneficiary fund. Said corporation received from its members applications for an interest in said fund. Such applicants were required to accompany said application with their agreement that in case they should be admitted to participation in such beneficiary fund, if they should cease to be a member of the order in accordance with the rules, or fail to pay all dues promptly when notified by the secretary, said applicant should forfeit all rights to participate in said beneficiary fund. Applicant was also required to state the name of a person to whom he desired benefits paid upon his death. Applicant was required to state his age, race, place of birth, occupation, habits and physical condition, age, or cause of death, of his parents; that to members accepted, the corporation gave a certificate in writing, under the corporate seal, signed by the president and secretary, which certificates were numbered according to their order of issue, binding itself to pay to the person named therefor in the application and in the certificate, upon the death of the member, seventy-five per centum of the money received by said corporation from the surviving members in response to notices of such death, issued by the secretary, and not exceeding $1500, and to pay to persons holding certificates numbered next above and

next below that of the deceased member, twenty-five per cent of said amount, and not exceeding $500, all of which powers, etc., said corporation and said directors have usurped, etc.

"*Second count*—After setting forth the incorporation of the 'Golden Rule,' as before, and the selection of directors to manage the business, as before shown, charges that said corporation, by and through its directors, officers, etc., wrongfully, and without authority of law, did engage in and transact a life insurance business, and for a valuable consideration did obligate said corporation to pay, upon the death, and proper proof thereof, of a member of said corporation, a sum of money to other persons not the widow, orphans, heirs or devisees of such deceased member, which powers, franchises, etc., said corporation and its officers, during, etc., have wrongfully usurped, etc.

"*Third count*—Sets forth the organization of the corporation and selection of officers. Said corporation, under the direction of said directors, unlawfully solicited and received applications for membership and participation in the benefits arising therefrom, and to such as were satisfactory said body corporate and directors issued a certificate, under the corporate seal and the hand of the president and secretary, in and by which certificate, in connection with the application therefor and the rules of said corporation, said corporation unlawfully bound itself, for a valuable consideration, upon the death of a member thereof, to notify the surviving members, and to collect and receive such payments or contributions of money as might be made by the surviving members, and to pay to a person named therefor in the deceased member's certificate, seventy-five per cent of the money so collected, not exceeding $1500, and to pay the remainder, not exceeding $500, equally to the two persons holding certificates next above and next below, in numerical order, the certificate of the deceased members,—all of which powers and franchises said defendants have unlawfully usurped, etc., to the damage and

prejudice of the People of the State of Illinois, and against the peace and dignity of the same; prays the consideration of the court, and process against the 'Golden Rule,' O. S. Barnum, T. S. Stamps, J. H. Wallace, John Troutman and W. B. Young, to make them answer to the said People by what warrant they claim to hold and exercise the franchises aforesaid.

JAMES MCCARTNEY, *Attorney General.*"

Summons was thereupon issued to the respondents by order of the court, returnable to the same term of court, on the 13th of January, the then present month. The summons was returned served upon all the respondents, the next day after it was issued,—*i. e.*, the 7th of January. On the return day of the summons the respondents appeared in open court, by their attorneys, and filed their motion to vacate the order granting leave to file the information, and also to quash the writ and dismiss the suit, and in support of the motion they filed an affidavit. The Attorney General objected that the court should entertain jurisdiction of the motion, but the court overruled the motion, to which ruling exception was taken. The following reasons were assigned in support of the motion:

First—Because no notice was given of the application for leave to file the information.

Second—A rule *nisi* was not entered, and served on the defendants, before leave given to file information.

Third—The petition, and affidavit in its support, and the exhibits made a part thereof, show upon their face the right of the defendants to exercise the corporate powers charged to have been usurped.

Fourth—The petition, affidavit and exhibits filed by the plaintiff show no cause of action.

Fifth—There is no probable ground for the proceeding in this case.

Sixth—The leave to file the information was improperly granted.

Seventh—The information does not set forth any cause of action mentioned in the statutes, against the defendants, on which an information in the nature of a *quo warranto* may be prosecuted.

Eighth—The defendant order of the "Golden Rule" is a secret society, having a supreme and subordinate council, and is therefore exempted by law from the control of the Auditor of Public Accounts.

Ninth—The order of the "Golden Rule" makes no assessments upon its members for its beneficiary fund, and therefore it is a purely social, and not a benevolent, organization, making assessments upon its members, and in no manner is an insurance company over which the Auditor has control.

Tenth—The "Golden Rule" is an organization of a purely social and benevolent character, where no commissions are paid, and no salaried officers or agents employed, and is therefore exempt from the laws governing insurance companies, and corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, heirs, relatives and devisees of deceased members, or accident or permanent disability indemnity to members thereof.

The court sustained the motion, and entered an order vacating the order for leave to file the information, quashing the writ, and dismissing the suit, to which there was exception.

Mr. E. S. SMITH, for the appellant:

Upon the question of practice in *quo warranto* proceedings, it is claimed that after leave has been granted in open court to file an information, and it has been filed, and summons issued and served, the defendants must plead or demur, and can not have a trial of the case upon affidavits of defendants to the merits of the case, upon a motion to vacate the order granting leave to file the information, to quash the writ, and dismiss the suit. Rev. Stat. chap. 112, secs. 1-4; Practice

act, chap. 110, sec. 11; *People ex rel.* v. *Morse*, 73 Ill. 132; *People* v. *Improvement Co.* 103 id. 491; *Holden* v. *People*, 90 id. 434.

I understand the proper practice to be, for the information to set forth the usurpation in general terms, and plea follows specifically setting forth defendant's title, then replication setting forth specific acts of forfeiture or want of title. *Hinze* v. *People*, 92 Ill. 407; *People* v. *Improvement Co.* 103 id. 491; *People* v. *Railroad Co.* 12 Mich. 389; *Commonwealth* v. *Commercial Bank*, 28 Pa. St. 383; *Attorney General* v. *Railroad Co.* 6 Ired. 464; *People* v. *Richardson*, 4 Cow. 106; *People* v. *Insurance Co.* 15 Johns. 358.

When a member applied for and received a certificate entitling him to one-half of twenty-five per cent of the amount collected upon the death of the members holding certificates numbered next above and below his certificate, he, in effect, took out a policy of insurance upon the lives of the two members to the extent of twelve and a half per cent of the amount collected upon the death of either or both of them, and such a policy is a wager policy, and it is contrary to public policy to permit that kind of business to be done. (*Life Ins. Co.* v. *Hogan*, 80 Ill. 35.) And as said in Duer on Insurance, it is as a crime, and not as an agreement, that such should be treated.

Mr. JAMES MCCARTNEY, for the appellees:

This is a suit brought by an individual relator, and notice should have been given to the defendants before leave was granted to file the information. High on Extraordinary Legal Remedies, secs. 608, 697.

Notice not having been given defendants of the petition for leave to file the information, it was proper, on the return day of the writ, to move to vacate the leave, quash the information, and dismiss the suit. High on Extraordinary Legal Remedies, sec. 731, *et seq.*; *Commonwealth* v. *Jones*, 12 Pa. St.

365; *People ex rel.* v. *Morse*, 73 Ill. 132; *People* v. *Mobley*, 1 Scam. 215; *People* v. *Shaw*, 14 Ill. 476; *People* v. *Waite*, 70 id. 25; *People* v. *Railroad Co.* 88 id. 538; *Commonwealth ex rel.* v. *Bank of America*, 10 Phila. 126.

The petition and affidavit of Swigert showed no sufficient ground for leave to file the information. They did not allege that the defendant society secured its benefits by assessments on surviving members. This is not an organization securing its benefits in whole or in part by assessments upon the surviving members, and therefore does not come under the law of 1883. The defendant society is of a purely social and benevolent character, and is excluded by the proviso to section 9 of the law of 1883, from the control of said law.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This case is not analogous to that of *The People ex rel.* v. *North Chicago Ry. Co.* 88 Ill. 538, as seems to be claimed by counsel for appellees. There the application was by a private party to file an information. Here it is by the Attorney General, at the instance and upon the affidavit of the Auditor of Public Accounts. It is provided by section 15, chapter 12, of the Revised Statutes of 1874, that "the Auditor shall be deemed the proper officer to institute all suits, motions, and other proceedings in law and equity, in which the State is plaintiff, except in cases otherwise provided by law." By other provisions of the statutes the Auditor is given supervision over life as well as other insurance companies, and where companies assume to insure without having sufficient legal authority, it is within the line of his duty to cause them to be prosecuted, and to be deprived of their franchises, etc. And by the second subdivision of section 4, chapter 14, of the Revised Statutes of 1874, it is made the duty of the Attorney General "to institute and prosecute all actions and proceedings in favor of or for the use of the State, which

may be necessary in the execution of the duties of any State officer." There is not, therefore, in our opinion, the slightest foundation for the position that this is a private prosecution. It is a suit instituted by appropriate public officers in respect to a matter which concerns, so far as we are able to perceive, the public alone.

The question now comes before us for the first time whether, under the first section of the amended and revised act in relation to *quo warranto*, of March 23, 1874, (Rev. Stat. 1874, chap. 112, p. 787,) it is necessary to lay a rule upon the respondents to show cause against it, upon presenting a petition to the court or judge for leave to file an information in the nature of a *quo warranto*. The language of the prior statute was: "It shall and may be lawful for the Attorney General, or the circuit attorney of the proper circuit, with the leave of any circuit court, to exhibit to such court one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, * * * and to proceed therein in such manner as shall be usual in cases of informations in the nature of *quo warranto*," (Gross' Stat. 1869, p. 533,)—thus adopting, unmistakably, the common law practice in that respect; and so we said in *The People ex rel.* v. *Waite*, 70 Ill. 25: "The mode for instituting such proceedings is, usually, as pursued in the case at bar. The State's attorney submitted a motion, based on affidavit, for leave to file an information in the nature of a *quo warranto*. A rule *nisi* was laid on defendant to show cause why the information should not be filed. Respondent answered the rule by counter affidavits."

But the language of the section now under consideration varies materially in this respect. It provides that "the Attorney General, or State's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent

jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a *quo warranto*, in the name of the People of the State of Illinois; and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue." This change in phraseology is so marked that we think it clear it was intended not to adhere to the former practice. If it was intended to adhere to it, why change the language of the statute? Authority is given by the present statute to the judge in vacation, as well as to the court, to act upon the petition. But a judge in vacation can make orders only to the extent the statute authorizes him to do so. He possesses no docket, can enter no general orders, and render no judgment in vacation, by virtue of his general powers as judge; and when he is, by statute, authorized to act in vacation, the statute itself is the measure of his authority. In *The People ex rel.* v. *Moore et al.* 73 Ill. 132, we held, while not passing upon this question, that the fact that the court, before acting upon the relator's petition, entered an order for a rule on the respondents to show cause, etc., did not render his act in subsequently refusing leave to file the information, erroneous; but we there intimated that the court might have acted upon the petition alone. We now hold that the court or judge may, under the present statute, act upon the petition of the relator without first laying a rule upon the respondents to show cause, and if satisfied that there are probable grounds for the filing of the petition, allow it to be filed. No hardship can result from this, when it is reflected that the summons, if ordered in vacation, must be returnable on the first day of the next succeeding term; and if ordered in term time, it must be returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the order of the court, (see Quo Warranto act, sec. 2,) and that the respondents, upon the return to the writ, may demur to

the information, and thus test its sufficiency; or, if it be sufficient, by plea set up any defence why judgment should not be pronounced upon it against the respondents. (See Quo Warranto act, sec. 4.) When the court had here allowed the information to be filed, and ordered the summons to be issued, its discretionary powers were exhausted, and the issues of fact and of law presented by the pleadings must then have been tried and determined "in accordance with the strict rules of law, in the same manner, and with the same degree of strictness, as in ordinary cases." (High on Extraordinary Legal Remedies, latter part of section 606.) It is not denied that if the order to issue the summons had been made under a misapprehension of some fact material to be known by the court before making such order, and but for which it would not have been made, it would have been competent for the court to vacate the order at any time during the term. But the court here acted upon no such mistake. It simply allowed that which should have been interposed as a defence on the final hearing, to be urged as a ground for vacating the order.

With regard to the merits of this case we desire to express no opinion, further than to say we think there is probable cause for allowing the information to be filed and the summons to issue. Although the payment of dues to a corporation on account of fees or assessments upon its members, may be purely voluntary, persons may acquire legal rights to share in them when they are paid. Through forfeiture of benefits, etc., payments of dues on account of fees or assessments may be almost, if not quite, as effectually enforced as by legal process. At present we do not perceive why the payment of a premium to one who holds a number next to that held by the one who dies, and solely because he does die, is not, in effect, in the nature of a wager upon the life of one in whom the party thus benefited has no interest, and why, therefore, the transaction is not within the condemnation of the principle announced in *Guardian Mutual Life Ins. Co.*

Syllabus.

v. *Hogan*, 80 Ill. 35. And see, also, to like effect, *Carman* v. *Wetherbee*, 105 Mass. 149; *State* v. *Standard Life Ins. Co.* 38 Ohio St. 281. At all events, it can not be said the questions are so clear and free from doubt that there are not probable grounds for allowing the petition to be filed.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

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JAMES McPHERSON

v.

THE VILLAGE OF CHEBANSE.

Filed at Ottawa May 15, 1885.

1. CITIES AND VILLAGES—*power to prohibit the keeping open places of business on Sunday.* Cities and villages incorporated under the general Incorporation act, by subdivision 66 of section 62, article 5, giving power "to regulate the police of the city or village, and pass and enforce all necessary police regulations," may pass an ordinance prohibiting persons from keeping open their places of business in such city or village, for the purpose of vending goods, wares and merchandise, on Sunday, and provide a penalty for a violation of the same.

2. SAME—*Sunday ordinance, whether inconsistent with Criminal Code—concurrent powers of municipal authorities and of the State.* The police regulations of a village may differ from those of the State upon the same subject, if they be not inconsistent therewith. A village ordinance prohibiting the keeping open of places of business on Sunday, for the sale of goods, etc., is not inconsistent with the provisions of section 261 of the Criminal Code.

3. SAME—*police powers, under general Incorporation law—of their extent as to subject matter.* Subdivision 66 of section 62, article 5, of the "Act to provide for the incorporation of cities and villages," which reads that the city or village council shall have power "to regulate the police of the city or village, and pass and enforce all necessary police regulations," is not limited in its application to the organization and regulation of a police force, but may extend to and embrace a subject matter of police regulation, under the general police power of the State.

Appeal from the Appellate Court for the Second District;—heard in that court on writ of error to the County Court of Iroquois county; the Hon. Stephen G. Bovie, Judge, presiding.

Mr. William Potter, and Messrs. C. H. & C. B. Wood, for the appellant:

The village board possessed no power to pass ordinances, except such as is expressly granted, or such as is necessary to carry into effect a power expressly granted. *City of Alton* v. *Fire Ins. Co.* 72 Ill. 328.

Municipal corporations exercise only delegated powers. *Schott* v. *People*, 89 Ill. 195; *Town of Petersburg* v. *Metzker*, 21 id. 205.

The granting of power to license certain occupations and business, specially enumerating them, by a familiar rule of construction must be construed precisely as if the law in express terms inhibited the licensing of all trades and occupations not contained in the enumeration. *City of Cairo* v. *Bross*, 101 Ill. 475.

By the common law, no judicial act could be done on Sunday; but as to all other acts not of a judicial nature, the common law made no distinction between Sunday and any other day. Parsons on Contracts, (5th ed.) 757, note n, and cases there cited.

The power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances," obviously only refers to ordinances for the organization and regulation of a police force that may be created and maintained in cities and villages. *Sheridan* v. *Colvin*, 78 Ill. 245.

Only such labor as disturbs the peace and good order of society, is prohibited by the statute. Crim. Code, sec. 261; *Richmond* v. *Moore*, 107 Ill. 429.

A municipal corporation can not, in virtue of its incidental power to pass by-laws, or under any general grant of author-

ity, adopt by-laws which infringe the spirit or are repugnant to the policy of the State as declared in its general legislation. Dillon on Mun. Corp. (3d ed.) sec. 329.

We claim that the regulations under police powers which such bodies may make, are confined to those enumerated in the act. *Hawthorn* v. *People*, 109 Ill. 302; *Harmon* v. *City of Chicago*, 110 id. 400.

Mr. Tracy B. Harris, and Mr. Thomas S. Sawyer, for the appellee:

The village authorities have power to regulate the police of the village, and pass and enforce all necessary police ordinances. Par. 66, sec. 1, art. 5, of act relating to cities and villages.

The right to pass laws regulating or prohibiting keeping open places of business on Sunday, is referable to police powers. Cooley's Const. Lim. 596, 588; *Specht* v. *Commonwealth*, 8 Pa. St. 312; *State* v. *Ams*, 20 Mo. 214; *Adams* v. *Hamel*, 2 Doug. (Mich.) 73.

The police regulations of the village may differ from those of the State upon the same subject, there being no limit to the power conferred on the village in that subject. Cooley's Const. Lim. 198, 199; *Rogers* v. *Jones*, 1 Wend. 261.

The regulation of labor, trade and traffic on Sunday is within the legitimate power of a city or village, and the ordinance in question is valid. 1 Dillon on Mun. Corp. p. 600, secs. 329, 330; *St. Louis* v. *Cafferatta*, 24 Mo. 94; *State* v. *Cowan*, 29 id. 330; *Frolichstein* v. *Mobile*, 40 Ala. 725; *Hudson* v. *Georcy*, 4 R. I. 485; *Specht* v. *Commonwealth*, 8 Pa. St. 312; *Cincinnati* v. *Rice*, 15 Ohio, 225; *Korwitch* v. *Atlanta*, 44 Ga. 204; *City Council* v. *Benjamin*, 2 Strobh. (S. C.) 508; *Megowan* v. *Commonwealth*, 2 Metc. 3; *State* v. *Welch*, 36 Conn. 215.

Opinion of the Court.

Mr. Justice Sheldon delivered the opinion of the Court:

This was a suit to recover from the defendant, who was engaged in the business of vending goods, wares and merchandise in the village of Chebanse, a penalty for keeping open his place of business in said village on Sunday, for the purpose above mentioned, in violation of an ordinance of the village prohibiting persons from keeping open their places of business in the village, for the purpose of vending goods, wares and merchandise, on Sunday. In the county court a demurrer was sustained to the declaration, and judgment was given for the defendant. On appeal to the Appellate Court for the second District, the judgment was reversed, and an appeal taken to this court.

The only point made for the reversal of the judgment of the Appellate Court is, that the village had no power to pass the ordinance in question. Subdivision 66, of section 62, article 5, of the "Act to provide for the incorporation of cities and villages," (Rev. Stat. 1874, p. 221,) gives the power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances." Under this grant of power, we are of opinion, there is found authority for the passage of the ordinance.

It is insisted this clause only refers to the organization and regulation of a police force. We think this a too narrow construction,—that the clause is not limited in its application to police officers, but may extend to and embrace a subject matter of police regulation, under the general police power of the State. Unintermittent toil of body or mind is not the best condition of either. They have need of relaxation and periods of rest from labor, in order for their healthfulness and greatest working efficiency. From the antiquity and general extent of the practice of setting apart one day in seven as a day of rest, that would seem to be denoted as a suitable, if not the necessary, requirement of the human economy as

to the portion of time which should be given to rest from labor. Thus, with the Jews, under the Mosaic code, we find one day in seven (the Sabbath) dedicated to an entire cessation from ordinary labor. Afterward we have the Lord's day. In A. D. 321, Constantine, by edict, ordered the suspension on Sunday of all business in the courts of law, except the manumission of slaves, and all other business except agricultural labor. In Great Britain, from early times, Sunday was set apart as not to be employed in secular labor. With respect to the transaction of judicial business, there came the legal maxim, *dies dominicus non est juridicus*. In the 29th of Charles II, (A. D. 1678,) after there having been passed several previous statutes prohibiting certain acts and business on Sunday, the statute was passed prohibiting the doing of any worldly labor, business or work of one's ordinary calling upon the Lord's day, works of necessity and charity excepted. In this country, statutes of a similar character, prohibiting labor on Sunday to a more or less extent, exist in most, if not all, the States of the Union. Aside from the religious aspect, the appointment of the Sabbath merely as a day of rest from labor, stands recommended as a valuable institution of State policy.

Authorities are cited to the purport that a municipal corporation can not, under any general grant of authority, adopt ordinances which infringe the spirit of the State law, or are repugnant to the policy of the State, as declared in its general legislation; and as our statute (section 261 of the Criminal Code, Rev. Stat. 1874, page 391,) goes only to the extent of forbidding such labor on Sunday as "disturbs the peace and good order of society," it is insisted that the ordinance goes beyond the State legislation on the subject,—that it is inconsistent with and against the policy of the general statute. The police regulations of a village may differ from those of the State upon the same subject, if they be not inconsistent therewith. (Cooley's Const. Lim. 198.) The ordinance does

not prohibit what the statute permits. There is no repugnancy between them. The ordinance may consist with the statute. The former differs from the latter in being more specific. We do not admit that the keeping open of the stores in a village on Sunday is allowable under the statute—that it would not disturb the peace and good order of society. Sunday, as it is observed by common usage, is not only set apart as a day of rest from labor, but it is devoted to religious worship. The consecration of the day to its wonted manner of observance, is a blessing to mankind. Besides the recuperative effect referred to, it has its other beneficent uses. It affords opportunity for moral, intellectual and social culture. It is promotive of good habits, and tends to improve the manners of men. It is civilizing and refining in all its influences. Whatever detracts from the observance of the day, as it is customarily observed, is not to be countenanced. The keeping open by persons of their places of business in a community, on Sunday, for the exercise of the business of their ordinary callings, is a public and serious interference with the observance of the day in its accustomed mode of observance. It is obstructive of the purposes for which the day is set apart. It is offensive to the moral sense of the community. It disturbs the peace of society, in its open interference with the peace and quiet of a day devoted as a day of rest and for religious worship. It disturbs the good order of society, in publicly and flauntingly, and in defiance of public sentiment, desecrating a day, and inviting others to its desecration, set apart for purposes of the highest well being of human society,—hence the entire harmony of the ordinance with the statute. As a police regulation, in the interest of the good order and well being of the community, the ordinance, in our opinion, finds justification. See Cooley's Const. Lim. 596, and authorities there cited.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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JAMES E. POWER

v.

WILLIAM L. RANKIN.

Filed at Springfield May 14, 1885.

1. STATUTE OF FRAUDS—*promise to pay the debt of another—of a new consideration—surrendering an existing security.* Where the moving consideration for the promise to pay money is the liability of a third person, the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, then the superadded consideration makes it a new agreement, which is not within the Statute of Frauds.

2. So where a party having a chattel mortgage upon a lot of corn, to secure a note of some $1200, relinquishes the same, and allows the corn to be sold and delivered by his debtor, in consideration that an agent, in whose hands $1000 was placed, had agreed to pay him that sum when the corn should be delivered, it was *held*, that the verbal promise to pay the holder of the chattel mortgage was not within the Statute of Frauds, and that an action would lie for a failure to make the payment.

3. COMMON COUNTS—*when a recovery may be had thereunder—or whether the plaintiff must declare specially.* Where the promise to pay money is a collateral undertaking, the declaration in an action for a failure to pay must be special; but when the promise is an original undertaking, a recovery may be had under the common counts.

4. So where the purchaser of a lot of corn gave a check for $1000 to the defendant, to be held until corn to that amount was delivered, and then paid to the seller, and a party holding a chattel mortgage on the corn would not consent to its delivery until the defendant agreed and promised to pay the same to him, it was *held*, that the mortgagee to whom the promise was made might recover the $1000, under the common counts, after the delivery of the corn, such promise being regarded as an original undertaking, as distinguished from one that is merely collateral.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. W. R. WELCH, Judge, presiding.

Messrs. BRADLEY & BRADLEY, for the appellant:

The court erred in overruling the motion to exclude all of plaintiff's evidence, because it was solely in proof of a verbal promise to pay the debt of Mrs. Glasscock, and void under

the Statute of Frauds. Hurd's Stat. 1881, sec. 1, chap. 59; *Owen* v. *Stevens*, 78 Ill. 462; *Laidlow* v. *Hatchett*, 75 id. 11; *Frane* v. *August*, 88 id. 424.

The promises declared on by the common counts could only be original promises, whereas these promises of Power, if he made them, were purely collateral promises, and being such, would have to be declared upon specially, in order to make the evidence proper under them. *Maxwell* v. *Longnecker*, 89 Ill. 102; *Coal Co.* v. *Hood*, 77 id. 68; *Durant* v. *Rogers*, 71 id. 121.

The promise or contract upon which the common counts are based, would be such as the law implies. An implied contract, however, will only arise in the absence of an express contract. *Compton* v. *Payne*, 69 Ill. 354.

Messrs. PATTON & HAMILTON, for the appellee:

Where the leading object of the undertaking is to promote some object of the party's own, his promise to pay is not within the Statute of Frauds, although its effect is to release or suspend the debt of another. *Wilson* v. *Bevans*, 58 Ill. 232; *Clifford* v. *Luhring*, 69 id. 401; *Scott* v. *White*, 71 id. 287; *Bunting* v. *Darbeyshire*, 75 id. 408; *Borchsenius* v. *Canutson*, 100 id. 82.

If there is a new consideration moving from the promisee to the promisor, as, when he gives up some lien or security, then the superadded consideration makes it a new agreement, for the performance of which no third person is liable, and it does not fall within the statute. *Scott* v. *Thomas*, 1 Scam. 58; *Curtis* v. *Brown*, 5 Cush. 491; *Nelson* v. *Boynton*, 3 Metc. 396; *Smith* v. *Sayward*, 5 Greenlf. 504; *Boyce* v. *Owen*, 2 McCord, 208; *King* v. *Despard*, 5 Wend. 277; *Calkins* v. *Chandler*, 36 Mich. 320.

An oral promise to pay the debt of another out of his property placed in the hands of the promisor for that purpose, is not within the Statute of Frauds. *Mason* v. *Wilson*, 84

N. C. 51; *Almstead* v. *Gould*, 18 Johns. 12; *Wait* v. *Wait*, 28 Vt. 350.

Power agreed to pay the $1000 to Rankin peremptorily and absolutely, and nothing remained for him to do but to pay the money, and the common counts were sufficient. *Childs* v. *Fischer*, 52 Ill. 167; *Jackson* v. *Hall*, 53 id. 440; *Runde* v. *Runde*, 59 id. 98.

The principle is this: When, in consideration of the promise to pay the debt of another, the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against, and the plaintiff may recover on the promise, or in an action for money had and received." See *Stanley* v. *Heddick*, 18 Ired. 86, quoted in *Mason* v. *Wilson*, 84 N. C. 51.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by William L. Rankin, against James E. Power, to recover $1000, which it is alleged Power agreed to pay in consideration that Rankin would permit certain corn, upon which he held a mortgage, to be delivered to a certain person to whom the corn had been sold by Mrs. Glasscock. Rankin recovered a judgment in the circuit court for the amount claimed, and that judgment was affirmed in the Appellate Court.

After the plaintiff had concluded his evidence, the defendant entered a motion to exclude the evidence from the jury. The court overruled the motion, and this decision of the court is relied upon as error.

The main ground relied upon in support of the motion is, that the admitted evidence established merely a verbal promise to pay the debt of another, and was therefore void under the Statute of Frauds. We do not concur in the view taken by appellant's counsel. As we understand the testimony, in the fall of 1881 Mrs. Glasscock was indebted to Rankin on a certain note for $1249, bearing date November 16, 1881, and

due October 1, 1882. The payment of the note was secured by a chattel mortgage on a crop of corn raised that season. In the summer of 1882, Mrs. Glasscock contracted the corn to Ulrich, who gave Power a check for $1000, which he was to hold until one thousand dollars' worth of the corn should be delivered, when the money was to be paid to Mrs. Glasscock, or her order. After the check was placed in the hands of Power, and before any of the corn was delivered, Rankin and Power met at the office of Mr. Sales, and Rankin refused to allow the corn to be delivered unless the money in the hands of Power should be applied on his mortgage indebtedness. After discussing the matter for some time, Power finally agreed if Rankin would permit the corn to be delivered to Ulrich, he would apply the money in his hands in payment of the note and mortgage held by Rankin. This arrangement was made, according to the testimony of Sales, about the first of August, 1882.

A parol promise to pay the debt of another is rendered void by the Statute of Frauds, and an action can not be enforced upon such a promise. There is no room for doubt as to the general rule on this subject. In *Scott* v. *Thomas*, 1 Scam. 58, it was held that where the moving consideration for the promise is the liability of a third person, there the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, there the superadded consideration makes it a new agreement, which is not within the statute. In *Borchsenius* v. *Canutson*, 100 Ill. 82, where the plaintiff had relinquished a lien or given up a security for a debt in consideration of a promise by a third party to pay the debt, the promise was held to be an original undertaking, and not affected by the Statute of Frauds. Here Rankin had a lien on the corn for the payment of his debt, which he relinquished, and allowed the corn to be sold, upon the promise of Power that the money ($1000) which he held in his hands should be paid to him. A promise of this char-

acter, under the rule established by the authorities, is an original undertaking, and in no manner affected by the Statute of Frauds. Such being the case, the evidence was properly admitted, and the court did right in overruling the motion to exclude the evidence from the jury.

But it is said in the argument that Rankin had no mortgage at the time Power promised to pay the money to him, and hence no lien was waived, or security given up, on the faith of the promise. This is a clear misapprehension of the evidence bearing upon this branch of the case. It is true that Rankin fixed the date of the promise made by Power to him, in September or October, 1881; but this was a mistake as to the date. The corn sold was the crop of 1881, but it was not delivered until August, 1882, and Sales, who was present and heard the arrangement made between Rankin and Power, testified that it occurred "about the beginning of the delivery of the corn, * * * from the 1st to the 11th of August, 1882." If there had been no evidence as to the date of the agreement except Rankin's testimony, there might be much force in appellant's position on this question; but the evidence of Sales places the date of the agreement beyond question, and at a time when the mortgage lien was in full force and effect.

Objection is made to an instruction given by the court in behalf of the plaintiff. We have examined the instruction, and while there may be objections of a technical character urged against it, yet so far as the law involved in the case is concerned, the instruction lays down a correct proposition of law.

It is also contended that the court erred in refusing one of defendant's instructions. The instruction refused may announce a correct proposition of law, and might, under a different state of facts, be proper; but as we understand the record, there was no evidence upon which it could properly be based, and under such circumstances it was the duty of the court to refuse it.

It is also objected that a recovery could not be had under the common counts. Where the promise sued upon is a collateral undertaking, then the declaration is required to be special; but where the promise, as here, is regarded as an original undertaking, a recovery may be had under the common counts. *Runde* v. *Runde*, 59 Ill. 98, is an authority in point on this question.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE NORTH CHICAGO ROLLING MILL COMPANY

v.

LARS F. JOHNSON.

Filed at Ottawa May 15, 1885.

1. NEGLIGENCE—MASTER AND SERVANT—*duty of the former to use proper precautions for the safety of the latter—as, in the unloading of cars, to avoid collisions, etc.* In an action to recover for personal injuries resulting from alleged negligence, it appeared the defendant company put the plaintiff and others of its servants to work unloading a railroad freight car standing on a spur of a side-track having connection with other tracks only at one end, and being a track not used for passing trains, and there being nothing to lead the laborers to believe the car they were unloading would be disturbed, and while so engaged the loaded car was violently struck by other cars which became detached from an engine used in switching cars in the yard, whereby the plaintiff was injured. It was *held*, that it was the duty of the defendant not to have brought on this peril without timely notice to the laborers so engaged; that either the cars ought not to have been brought into the position they were, without notice, or it should have been first ascertained that no danger to the laborers could result therefrom, and that the failure to do so was gross negligence.

2. The attempt to bring a train of cars on the switch to a point where the defendant's servants were engaged in unloading a car, where the grade was a descending one, without notice to them, or any signal by the bell or whistle of the engine of the approach on such track, and without having the moving cars under control by proper and sufficient couplings and brakes attached, the yard-master knowing that men were engaged all around the car they were unloading, was gross negligence on the part of the defendant.

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152 467
152 593
155 634
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51a 514

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46a 223

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55a 247

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65a 352

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67a 30
67a 620
68a 247

114 57
69a 59
70a 334

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75a 163
76a 600
76a 625

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80a 397

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92a 634

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182 222

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193 177

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104a 33

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110a 13

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209 [6]129
111a [12]91
112a [6] 9
114 57
118a [6] 47

Syllabus.

3. SAME—*as to whose duty it was to see that the appliances for controlling the moving cars were in proper order, etc.* In such an action, where the injury resulted from the uncoupling of certain cars in a train being switched in the defendant's yard, so that they could not be controlled by the engine, and from a defective brake on one of the detached cars which struck the car on which the plaintiff was engaged at work, it was held to be wholly immaterial whose duty it was to inspect the couplings of the cars, brakes, etc., or how on that occasion the engineer handled his train, and that proffered evidence in such respect was properly excluded.

4. SAME—*as to what is negligence—evidence in respect thereto—custom at other places as to the mode of handling railroad cars.* Where the charge of negligence of a defendant is the sudden starting of a detached car upon which the plaintiff was engaged in unloading brick, without previous notice or warning, by the collision of other cars being pushed back, evidence tending to show that the pushing of the cars instead of pulling them was not negligence, is inadmissible. The custom in other yards as to pushing or drawing cars in such a case is wholly immaterial.

5. SAME—*proof of custom as to watchfulness of railroad laborers in loading and unloading cars.* In an action by a laborer employed by defendant, to recover for an injury caused by the collision of other cars being switched, with the one on which he was unloading brick, without any signal or warning, the court sustained an objection to this question asked by the defendant of a witness, who was a switchman: "What, if anything, was the rule or custom as to laborers unloading and loading cars, and switchmen, with reference to the laborers looking out for the movement of their car while being loaded or unloaded?" *Held*, that the ruling was correct, as it was not shown there was any rule or custom in this respect. If the men were enjoined to keep a lookout constantly for the approach of trains while at work, that fact was susceptible of proof.

6. FELLOW-SERVANTS—*who regarded as holding that relation, within the rule exempting master from liability for injury to one by negligence of the other.* Servants of the same master, to be co-employes or fellow-servants, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, must be such as are directly coöperating with each other in a particular business,—that is, the same line of employment,—or such that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution.

7. The relations of the servants must be such that each, as to the other, by the exercise of ordinary caution can either prevent or remedy the negligent acts of the other, or protect himself against its consequences. Where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of an immediate superior, the doctrine exempting the master can have no application.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. W. H. BARNUM, Judge, presiding.

Messrs. WILLARD & DRIGGS, for the appellant.

Messrs. BRANDT & HOFFMAN, for the appellee.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant was possessed of a rolling mill, and other works connected with it, and of adjoining yards, upon which were railway tracks used for the movement of cars belonging to appellant and to other parties with whom it did business, under the management and control of employes of appellant. Appellee was in the employ of appellant as a common laborer, and had been, for about one month, engaged in removing rails from its mill and placing them upon cars, though it was within the line of his duty to unload bricks from cars, and, in general, to perform any common labor required of him in and about the mill. He was under the immediate charge and control of one Clute, assistant foreman of the rail mill. He and a number of co-laborers were directed by Clute to unload the bricks from a car standing on one of appellant's tracks near the rolling mill, which they were proceeding to do, when, before they had quite finished the work, a train of cars was backed down the track on which the car they were unloading was standing, and against that car with such violence as to suddenly put it in motion, and thereby to knock appellee down and break his leg, and otherwise seriously injure him. The train causing this injury was under the immediate charge and control of one Crowley, appellant's yard-master, and neither Clute had any charge or control of the men operating the train, nor Crowley any charge or control of appellee and the other men engaged in unloading the bricks.

Appellant claims that the injury was caused, primarily, by a defective link coupling the cars somewhere near the middle of the train, which breaking, the train parted, and as it was being backed or pushed, with the engine in the rear, that part in advance beyond this break could not thereafter be controlled by the engine; and, secondarily, by a defective brake-wheel on the extreme advancing car, whereby it was impossible to check the momentum of the cars, the grade descending from the point at which the break occurred, to the car from which the bricks were being unloaded. Crowley had caused the car-load of bricks to be placed where it was, and shortly before the injury had sent men to remove it, but finding that it was not yet unloaded, had countermanded that order and directed that certain coal cars be brought and backed in, and these composed the train causing the injury. He claims to have given a signal to stop the train when he saw that it was likely to hit the brick car, and also that when he saw, afterwards, that the train had not stopped, he cried out to the men unloading the brick, to look out, etc. It is not claimed that any bell was rung or whistle sounded to give warning of the approach of this train, and it is quite evident that no cries or words of warning reached the ears of appellee, and of some of the other laborers.

On the trial, appellant's counsel asked a witness, who was a switchman in appellant's yard, whether he was acquainted with the manner of switching in other yards, as to having the cars ahead or behind the engine. The question was objected to by appellee's counsel, and the objection was sustained by the court. It is now urged that this ruling was erroneous. This contention results, as we conceive, from a misapprehension of the issue before the jury. Counsel seem to understand that the fact the cars were *pushed* rather than *pulled* by the engine, is charged in the declaration as the negligence whereby the injury was caused. The *gist* of the charge of negligence, in each count, is, that the car wherefrom appellee and others

were unloading bricks, was, without any previous notice to them, by the ringing of the bell or otherwise, suddenly started or driven forward by the collision of the cars that were being pushed. The same result, precisely, might have been produced by pulling the cars. Whether it was negligent to back up a train is nowhere made a question, but the negligence charged lies wholly in the backing of the train, without previous notice, against a standing car which is being unloaded. It is not possible, therefore, that what may have been done in other yards in switching, in respect of having the cars before or behind the engine, could have in any degree enlightened the jury as to this issue. We do not, therefore, think anything decided in *Pennsylvania Co.* v. *Stoelke*, 104 Ill. 201, and *Pennsylvania Co.* v. *Hankey*, 93 id. 580, has any relevancy.

Again, counsel for the appellant asked the same witness, "What, if anything, was the rule or custom as to laborers unloading and loading cars, and switchmen, with reference to the laborers looking out for the movement of their car while being loaded or unloaded." Appellee's counsel objected to the question, and the court sustained the objection, and this ruling, also, is claimed to be erroneous. It is sufficient, to sustain this ruling, that it was not shown that there was any rule or custom in this respect, nor did the counsel offer or propose to prove any particular custom upon the subject. Apart from this, however, the witness seems to have been allowed to state, without objection, all that he knew in that regard. He says: "It sometimes happened there in the yard, that while a car was being loaded or unloaded it became necessary to couple to it and move it, for the purpose of placing other cars. It would happen once a day, on an average. We can not tell half a day in advance about the necessity for moving cars which are being loaded or unloaded. When it became necessary to move cars during the time of loading or unloading, we could notify the boss, and if we were going into the stock house, we would whistle or ring the bell. * * *

We might move a car whilst it was being unloaded. If it became necessary to do so, we notified the boss of the men. That was the custom." If the men were enjoined to keep a lookout constantly for the approach of trains while at work, the fact was susceptible of proof, but the evidence offered did not tend to prove that.

Another witness was asked by counsel for appellant,—he having previously stated that he was acquainted with the manner in which switching was done in other yards,—"Is it ordinarily expected of the switchmen to examine the coupling-pins and brakes, and things of that kind?" And again, "What was the custom at and before that time, in that yard, respecting the examination of links, pins and couplings, by the brakemen and switchmen?" Another witness, the engineer, was asked by the same counsel, "State whether you were managing your train in the usual and ordinary way." Another witness was asked by the same counsel whether he knew what the custom was in and around the city of Chicago in respect to switchmen in the yard examining each car, and seeing whether it is in order or not before they move it; and upon being answered in the affirmative, the counsel proposed to prove by this witness that "it is not the ordinary custom of switchmen in any yard, within the knowledge of this witness, to examine into the condition of the cars before they move them,—that is the duty of other persons." The court, on objection, held each of these questions inadmissible, and refused to allow them to be answered,—the last question, however, only so far as other yards in Chicago were concerned, the witness being permitted to state what was the custom of appellant in this respect,—and we are asked to reverse the judgment below because of these rulings, also. We think it enough to say, that in our opinion it was wholly unimportant whose duty it was to inspect the couplings of the cars, brakes, etc., and how, on that occasion, the engineer managed his train. The facts are uncontroverted that appellee

and others were put to work unloading a car standing on a spur of a side-track,—*i. e.*, a track having connection with other tracks only at one end. It was not at a place where there were passing trains. There was not a single circumstance in evidence tending to prove that a laborer at that car ought to have anticipated that it might be disturbed while being unloaded. The labor was wearisome and engrossing, and its performance required of the laborers immediate and constant attention. It was, therefore, the duty of appellant to bring no peril upon the laborer without first giving him timely notice. Either the cars ought not to have been brought into the position they were, before the bricks were unloaded, and without timely notice to the laborers of the danger thereby, or it should have been first ascertained that no danger to those laborers could result. No matter whose individual duty it was to inspect the company's brakes, etc., the obligation was upon appellant not to bring upon appellee and the other laborers, without previous timely notice, in the helpless condition they were, this danger, and to do so was, unquestionably, in fact, gross negligence, to which there was no contributive negligence on the part of appellee. The ruling was entirely correct, in our opinion. The proposed evidence, instead of enlightening, would only have tended to perplex and mislead the minds of the jury.

It is objected that the court below erred in submitting the question of comparative negligence to the jury, because there was no circumstance tending to show gross negligence on the part of appellant. We do not concur in this view. In addition to the circumstances before alluded to as tending to prove gross negligence upon the part of appellant, is the fact that we have previously stated, that from a point some distance in the direction of the connecting tracks there is a down-grade to the point where the car from which the bricks were being unloaded stood; and to bring cars to that point without having them certainly under control, while knowing,

as this yard-master did, that men were at the same time engaged all around the car taking out the bricks, and their attentions absorbed in their labors, is but little, if any, short of criminal recklessness.

Objection is also urged that the court erred in refusing to give the seventh in the series of instructions asked by the appellant. It reads as follows:

"If the jury believe, from the evidence, that plaintiff's usual employment at and before the time of the injury was to load and unload cars in the defendant's yard, and that it was the usual duty of those having control of the train in question to move cars in said yard before and after being unloaded, and that the plaintiff, and those having control of said train, whilst engaged in their respective employments, could observe how each did their work, then the said plaintiff and the persons having control of said engine were co-employes."

This falls short of an accurate statement of what is essential to constitute a co-employe, within the ruling in *Chicago and Northwestern Ry. Co.* v. *Moranda*, 93 Ill. 302, *Chicago and Alton Railroad Co.* v. *May, Admx.* 108 id. 288, and *Chicago and Eastern Illinois Railroad Co.* v. *Geary*, 110 id. 383. That ruling requires that the servants of the same master, to be co-employes, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly coöperating with each other in a particular business,—*i. e.*, the same line of employment,—or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is, that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences; and, of course, where there is no right or no opportunity of super-

vision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors, to influence the conduct of the laborers in that department? The instruction was properly refused.

Perceiving no sufficient ground upon which to reverse the judgment below, it is affirmed.

Judgment affirmed.

GEORGE F. HARDING

v.

JOHN V. LE MOYNE *et al.*

Filed at Ottawa May 15, 1885.

1. ADMINISTRATION OF ESTATES—*lands of an estate—powers and duties of the administrator in respect thereto.* An administrator takes no interest in or to the realty of his intestate. In no event can he take anything more than a mere power, and in the absence of an insufficiency of personal assets to pay debts, he has nothing whatever to do with it.

2. SAME—*sale of land to pay debts—prerequisites to the right.* Under the act of 1857, it is essential to the right of an administrator to apply for an order to sell real estate to pay debts, and to the jurisdiction of the court to grant such order, that it shall be made to appear by the petition that the personal estate of the testator or intestate is insufficient to pay the just debts against his or her estate, and that there be real estate to which the testator or intestate had "claim or title," and that the executor or administrator has made a just and true account of the personal estate and debts of the deceased, to the proper county court. Unless these jurisdictional facts appear on the face of the petition, the court has no power to make any order in the premises.

3. SAME—*of the character of title required, in order that the land may be sold.* On an application by an administrator for leave to sell land to pay

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debts and costs of administration, it is not material whether the deceased had the better title to the land sought to be sold or not, or, indeed, whether he had any title at all. It will be sufficient if the deceased, at his death, had a *bona fide* claim of title.

4. SAME—*claim of title adversely—whether it should be interposed, and for what purpose.* In a proceeding by an administrator for leave to sell land to pay debts, the court, exercising but a mere statutory authority, has no jurisdiction to settle and determine conflicting titles to the land, or to remove clouds upon title. If the paramount owner of the land is made a defendant, it would doubtless be his duty to assert his rights to the same in his answer,—not for the purpose of forming an issue to be tried in that proceeding, but for the purpose of giving notice of his rights, and thus prevent an estoppel *in pais.*

5. SAME—*of defences generally, to application to sell land to pay debts—and in what manner interposed.* The procedure upon appearance of the defendants being as in chancery, if the petition fails to state all the facts necessary to give the court jurisdiction, the defendants may demur to the same, or move in arrest, or treat the whole proceeding as a nullity. If the petition is good on its face, but in fact is untrue, an answer would be necessary, which may be a simple traverse of the facts alleged, or the answer may set up any special circumstances showing that the debts or claims for the payment of which the land is sought to be sold, are not *bona fide*, or legally binding on the estate or heirs.

6. SAME—*of the decree of sale—of its requisites, and the measure of relief it may give.* Whatever is necessary to effectuate the sale of the "title or claim" which the deceased had to the land sought to be sold, the court may lawfully do; but it must act on the title or claim as it finds it. The court must find the amount of the indebtedness, order the sale, fix its terms, and prescribe the manner of conducting it, so far as this is not done by the statute itself; and when made, the court may either approve it, or set it aside for proper cause.

7. As a necessary incident to the power to make the sale, the court must also determine whatever questions may arise in respect to the payment of the purchase money or the sufficiency of the conveyance, and, in short, all questions relating to the sale. In respect to the land, the court can find only the fact that the deceased had title or a claim to the same, and the sale will be subject to all adverse independent claims of title.

8. SAME—*possession—how acquired by purchaser—power of the court ordering sale.* The court, whether the circuit or county court, under whose decree an administrator sells land to pay debts, has no right or authority of law to enter an order requiring the delivery of possession to the purchaser by parties claiming an independent title thereto. The purchaser must establish his right to the possession by an action in a court of law where legal titles are cognizable.

9. CHANCERY—*power to give possession of land.* Courts of equity in the exercise of their ordinary and general chancery jurisdiction, where the right to possession of real property is involved or liens thereon are to be enforced, and all persons in interest are made parties, may, upon the consummation of the suit, do complete justice by putting the successful claimant into possession. And on a sale in a proceeding to foreclose a mortgage or enforce a lien, the court may extend the same relief to a purchaser under the decree.

10. But this rule has its exceptions. Thus, if one, pending the suit, enters, not under a party thereto, or under one who had not derived title to the premises, or had gone into possession under a party pending the suit, he can not be turned out of possession under the decree. So in case of a foreclosure sale, if the person in possession shows a right paramount to the mortgage, the court will not attempt to decide any question of legal title, and the possession must then be sought by proceedings at law.

11. ESTOPPEL—*by failing to assert party's rights.* It is a principle of general application that when the owner of property, real or personal, sees another having no right, or a limited right thereto, about to sell it absolutely to an innocent purchaser, he must speak and assert his ownership, otherwise he will be estopped from setting up his title against such purchaser, or one claiming through him.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. GEORGE R. GRANT, for the appellant:

The writ of assistance will issue in all cases to put a purchaser in possession who has purchased under decree of court. *Kessinger* v. *Whittaker*, 82 Ill. 25; Rorer on Sales, secs. 1-18.

Under the Revised Statutes of 1874, (chap. 37, sec. 49,) there is expressly conferred upon even the probate court, in such proceeding, full power "to make all necessary orders to carry into effect any decree previously entered, including necessary writs therefor." Such a motion is a mere continuance of the original case; and no one can intermeddle *pendente lite*, and if they do, they may be disregarded. Rorer on Sales, secs. 1-18.

In *Bush* v. *Fowler*, 36 Ill. 53, the court fixes the limits of power of giving possession by saying what the court can not do, viz., that the court can not put out one who is not a party and who was in possession before suit was brought. *Richardson* v. *Hadsall*, 106 Ill. 477. See, also, 37 Ill. 300, showing this to be the only exception.

The writ is "*ex debito justitiæ.*" *Beatty* v. *De Forrest*, 12 C. E. 482.

Some difficulties are alleged to exist touching the letting of the plaintiff into possession of an undivided half. This is the form of the proper order in such case. (Freeman on Co-tenancy, secs. 287-289.) On page 295, the order is stated to be, "to let the plaintiff into possession,"—not to put the defendant out.

In *Morse* v. *Finch*, 1 Scam. 495, this court held that forcible detainer may be maintained by one tenant in common against another. In *Bruce* v. *Roney*, 18 Ill. 74, the court held, reversing and remanding, with instructions to follow its judgment, that a writ of possession might become necessary, and should be entered in conformity with its opinion for what was, in that case, an undivided half of the premises.

Mr. JOHN P. WILSON, for the appellees:

A proceeding by an administrator to sell land is purely statutory, and in it the court has no power or authority to determine questions of title or rights of possession. *Beebe* v. *Saulter*, 87 Ill. 521.

The application, here, is to remove obstructions,—not an application in the progress of the cause, when a hearing can be had, but by an order, after the court has granted all the relief asked by the administrator, and after the court has exhausted all authority given by the statute. The administrator could not have asked, or the court granted, a determination of the question as to the right of possession, either before or after a sale.

An administrator takes no kind of an estate, title or interest in the realty of his intestate. At most, he takes but a power of sale upon a deficiency of personal assets. *Ryan* v. *Duncan*, 88 Ill. 146; *Le Moyne* v. *Quimby*, 70 id. 399; *Stone* v. *Wood*, 16 id. 177; *Smith* v. *McConnell*, 17 id. 135.

It is a general and well settled rule that the doctrine of *caveat emptor* applies to all judicial sales, under which falls an administrator's sale of lands to pay debts. The person who buys at such sale must examine for himself. *Tilley* v. *Bridges*, 105 Ill. 339.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

It appears from the record before us that Charles W. Ricketson died testate October 4, 1866, leaving Polly, his widow, and Lizzie, his only child, sole devisees under his will. At the time of his death he was the owner, subject to a vendor's lien for a part of the unpaid purchase money, of the undivided half of the west half of section 3, town 38, range 13, and also of the undivided half of so much of the east half of the same section as lies south of the canal. Henry M. Shepard having been appointed administrator *de bonis non* with the will annexed, on the 17th of June, 1870, filed in the circuit court of Cook county a petition to sell the testator's interest in the above mentioned lands, or so much thereof as might be necessary to pay the debts of the deceased. The widow, daughter, and appellee William Scully, then and now a tenant in possession, were made parties to the petition. The widow and daughter answered, admitting the allegations of the petition, but alleging they had, subsequently to the filing thereof, conveyed their interest in the premises to appellee John V. Le Moyne. Scully entered his appearance, and consented that the order of sale might be granted, which was accordingly done on the 21st of June, 1870. In the following month, proceedings under the petition were enjoined

by Benjamin F. Quimby. Pending the injunction, to-wit, on the 9th of October, 1871, the record of the proceedings in both these suits was destroyed by fire. The record of the proceedings under the petition was restored on the 15th of May, 1875, and the premises, after various suits and protracted litigation, an account of which will be found in *Harding* v. *Shepard et al.* 107 Ill. 264, were finally sold on the 6th of March, 1884, under the order of sale above stated, several parcels of which were purchased by the appellant, George F. Harding, and the residue by George B. Carpenter, who subsequently assigned his bid to Le Moyne, and the administrator's deed was accordingly made to him instead of Carpenter, for the part purchased by the latter. Five separate deeds, bearing the same date of sale, were prepared and executed by Shepard to Harding for the parcels purchased by him, the purchases amounting in the aggregate to $55,000, which was duly paid by Harding. On the 13th of the same month the court, upon a formal application for that purpose, of which all parties in interest had notice, approved the report of sale and the deeds executed to the purchasers. The cause seems to have been transferred from the circuit to the Superior Court, as the proceedings last above mentioned were had in the latter court. On the 26th of May following, the appellant filed in the Superior Court of Cook county a petition, entitled "Henry M. Shepard, administrator *de bonis non* of Charles W. Ricketson, deceased, against Lizzie W. R. Allen and others," setting up his purchases at the administrator's sale, and the conveyances by the administrator to him, as above stated; that Le Moyne and Scully were in possession of the land, and had been since the sale; that although petitioner had demanded possession of the premises, the defendants refused to surrender the same. The petition concludes with a prayer that the court order the defendants to deliver up possession of the premises so purchased by him, to the petitioner. Scully, protesting the court had no power

or jurisdiction to make such order, answered that "he was in possession of the section under a lease from Le Moyne for an undivided half, and from Carpenter for the other half; that Le Moyne and Carpenter had good titles to said premises, and the court had no power to try the validity or the right of possession of defendants, and prayed the rule to be discharged." Le Moyne, without waiving objection to the jurisdiction, and insisting the court had no power to enter the rule, says that he is the owner of the undivided half of said section, and acquired the equitable title more than ten years ago; that the trustees of the canal, in whom was the title, conveyed to him on November 10, 1883; that he has leased to William Scully said undivided half of the west half, and to Dennis Doran an undivided half of the east half of the section. The court, upon the hearing, entered an order denying the petition, which, on appeal, was affirmed by the Appellate Court for the First District. By the present appeal the judgment of affirmance is now before us for review.

In addition to what has already been stated, it is expressly charged in the petition "that Le Moyne and Scully, colluding with one George B. Carpenter, who claims to have a tax deed, set up that Scully has attorned to Carpenter, and delivered possession to Carpenter, and Scully has taken a lease from him." It is manifest from the answers, as well as from what appears upon the face of the petition itself, that there are now existing unsettled conflicting claims between appellant and the defendants in the petition, respecting the property in controversy, and we fail to find anything in the statute under which the proceeding was had, to authorize the Superior or circuit court to investigate, settle or determine these conflicting unsettled titles or claims. The court, in cases of this kind, acts under a limited statutory authority, and its jurisdiction is not to be extended, by implication, beyond what is necessary to give effect to the objects and purposes of the legislature in adopting the act. The power of the court to

adjudicate in any case is necessarily limited in a large degree by the nature and extent of the rights sought to be enforced. Section 1 of the act of 1857, under which the order of sale was obtained, provides, "that when it can be ascertained that the personal estate of any testator or intestate is insufficient to pay the just claims against his or her estate, and there shall be any real estate to which such testator or intestate had *claim or title*, and the executor or administrator has made a just and true account of the personal estate and debts to the county court having jurisdiction thereof, such real estate, or such portion as may be necessary to satisfy the indebtedness of such testator or intestate, and the expenses of administration, may be sold in the manner herein provided." This section, it will be perceived, enumerates in express terms the jurisdictional facts which must exist before any right or authority whatever is conferred upon the personal representative of the deceased to make an application at all for an order of sale, and these facts must appear upon the face of the petition which is authorized to be filed by the second section of the act, and unless they do so appear the court has no power or authority to make the order. The widow, heirs and devisees of the deceased, and the guardians of minors, if any, together with the occupants of the premises, are required to be made parties, and others interested in the estate may appear, if they see proper, and make themselves parties to the proceeding. For what purpose are these persons made or permitted to become parties to the proceeding? Surely not to settle conflicting titles to the property, for, so far as this proceeding is concerned, it does not matter whether the deceased had the better title or not, nor, indeed, whether he had any title at all. For the purposes of an application of this kind it is sufficient that the deceased had a *bona fide* claim to the land. The statute does not, in express terms, require the claim to be *bona fide*, but that, perhaps, would be implied. The object of making the parties named in the stat-

ute, defendants, is clearly for the purpose of enabling them to see that no injustice is done the estate or those having claims against it, and that the requirements of the statute are complied with. By the 7th section it is provided the procedure upon appearance is to be as in chancery. If, therefore, the petition fails to state all the facts necessary to give the court jurisdiction, a demurrer would be proper, or the defendants might rely on a motion to set the proceeding aside, or treat it as a mere nullity. If the petition is good on its face, but in fact is untrue, an answer will be necessary. The answer may be a simple traverse of the facts alleged in the petition, or it may, if the case warrants, set up any special circumstances which go to show that the debts or claims for the payment of which the land is sought to be sold, are not *bona fide* or legally binding on the estate. Defences of the character mentioned are alone contemplated by the statute. If there were any doubt on this subject it is certainly removed by reference to the provisions of the 8th section. After stating that, upon the hearing, it shall be the duty of the court to hear and examine the allegations and proofs of the parties, etc., the section then proceeds: "And if, upon due examination, the court shall ascertain that the executor or administrator has made a just and true account of the condition of said estate, and that the personal estate of the testator or intestate is not sufficient for the payment of the debts against such estate, the said court shall find, as nearly as can be, the amount of the deficiency, and how much, and if a part, what portion of the real estate described in the petition it will be necessary to sell to pay such deficiency, with the expenses of administration then due or to accrue, and make a decree for the sale thereof."

It is clear, from these several provisions of the statute, that nothing could have been farther from the intention of the legislature than that in a proceeding of this kind there should be any inquiry into or attempted settlement of con-

flicting claims to the property sought to be sold. If the paramount owner should happen to be joined as a defendant to the proceeding, it would doubtless be his duty to assert his rights to the property in his answer,—not for the purpose, however, of forming an issue of the kind to be tried in that proceeding, but for the purpose of giving notice of his rights, to prevent an *estoppel.* It is a principle of general application that where the owner of property, whether real or personal, sees another having no right, or a limited right, thereto, about to sell it absolutely to an innocent purchaser, it is his duty to speak, otherwise he will be thereafter estopped from setting up his title against such purchaser, or one claiming through him.

As the power of the court to adjudicate in a particular case is limited by the nature and extent of the right sought to be enforced, particularly when exercising a mere statutory jurisdiction, as is the case here, it is important to note with particularity just what rights the administrator has in respect to the real estate of his intestate. It is clear, under the repeated decisions of this court, as well as from a general unbroken current of authority on the subject, that he takes no interest in or to the realty. In no event can he take anything more than a mere power, and in the absence of an insufficiency of personal assets to pay the debts of his intestate, he has no more to do with it than a stranger having no connection whatever with the estate. And even when such insufficiency in the personal assets exists, he has, as just remarked, but a mere power to sell for the payment of debts, and this right can only be enforced through the instrumentality of some court specially authorized to do so. Whether this power is conferred on a circuit, probate or county court, makes no difference. The power and jurisdiction to enforce and give effect to the right are the same in either case. As such right can only be enforced through the instrumentality of some court clothed with special authority for that pur-

pose, the act conferring it must be so construed as to give full force and effect to the right. Whatever, therefore, is necessary to effectuate the sale of the "title or claim" which the deceased had to the land sought to be sold, the court may lawfully do, but it must act on the title or claim as it finds it. The right of the administrator does not extend to the removing of clouds upon or obstructions standing in the way of the title, and without such right the court can not apply a remedy, for every remedy which the law affords must necessarily be responsive to some legal right. What, then, may the court properly do where a case is sufficiently made out under the statute? Evidently the court must find the amount of the indebtedness, order the sale, fix its terms, and prescribe the manner of conducting it, in so far as this is not done by the statute itself, and when made, the court must either approve or set it aside. As a necessary incident of the power to make the sale, the court must also determine whatever questions may arise in respect to the payment of the purchase money, or the sufficiency of the conveyance, and, in short, all questions relating to the sale or transfer of the land. In respect to the land itself, the court is required to find a single simple fact, namely, that the deceased had title or a *claim* to it. That others may have claims to the same land, whether before the court or not, is a matter of no consequence, for the court is not authorized to investigate or pass upon them. The lien of the creditors of the deceased upon the land for the payment of their claims, after the personal assets have been exhausted, is coëxtensive with the title or claim of the deceased, whether it be good or bad, and the heirs or devisees take subject to this lien. It follows, therefore, that a valid sale by the administrator or executor would cut off whatever title or claim they had *as* heirs or devisees, but a claim founded upon an independent source of title would not be affected by such sale.

What we have said thus far, is merely preliminary to the main question in the case, namely, whether it is proper for the court, in a proceeding by an administrator to sell land, to enter an order directing the tenants in possession to surrender possession of the premises to the purchaser, for if it is not, of course the present petition can not be maintained. We have dwelt upon the nature and extent of the jurisdiction of the court in this class of cases to an apparently unwarrantable length, for the reason we think they have an important bearing upon the controlling question in the case, as just stated. In support of the general views here expressed we refer to the following authorities: *Choteau* v. *Jones*, 11 Ill. 300; *Smith* v. *McConnell*, 17 id. 135; *Bennett* v. *Whitman*, 22 id. 448; *Myer* v. *McDougal*, 47 id. 278; *Gridley* v. *Watson*, 53 id. 186; *Shoemate* v. *Lockridge*, id. 503; *LeMoyne* v. *Quimby*, 70 id. 399; *Cutter* v. *Thompson*, 51 id. 531; *Ryan* v. *Duncan*, 88 id. 144.

We fully recognize the rule that in controversies before courts of equity, when exercising their ordinary and general chancery jurisdiction, in which the right to possession of real property is involved, or liens thereon are to be enforced, and in which all parties directly interested in the result of the litigation are required to be made parties, either as plaintiffs or defendants, it is not only proper, but it is the duty of the court, upon the termination of the suit, to do complete justice by putting the successful claimant into possession of the premises; or, where the circumstances are such as to require a sale of the property, as in the case of a foreclosure of a mortgage, enforcement of a vendor's lien, and the like, the court should extend the same relief to a purchaser under the decree. (*Aldrich* v. *Sharp*, 3 Scam. 261; *O'Brian* v. *Fry*, 82 Ill. 87; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609.) But this general rule is not without its exceptions. Thus, in 2 Jones on Mortgages, sec. 1664, after having recognized the general rule, and shown that it applies to parties who enter pending

the suit, the author adds: "Though one enter pending the suit, *if he* did not enter under a party to the suit, or under any one who had derived title to the premises, or had gone into possession of them under a party pending the suit, he can not be turned out of possession under the decree,—as, for instance, if he purchased after the commencement of the suit, at a sale under a judgment against the mortgagor recovered before that time." In the following section it is added: "If the person in possession shows a right paramount to the mortgage, of course *the court will not attempt to decide any question of legal title, and the possession must then be sought by proceedings at law.*"

In the case before us it affirmatively appears the premises have been sold for taxes, and that a tax deed for the same has been executed by the proper officer, through which the defendants in the petition now claim. If the tax proceedings resulting in the tax deed were regular, of course they would divest and cut off appellant's title, however good it may have been. But it is answered the tax proceedings were not regular, but wholly defective and void, and that appellant offered to show this fact; yet it is clear this would have involved a judicial investigation, which the court had no power to make. Even had the court been exercising its general chancery jurisdiction, it would not, according to the authority just cited, have undertaken to settle the question of mere legal title, but would have remitted the parties to a court of law, which is more appropriate for the trial of legal titles.

But outside of this consideration, for reasons already stated, we do not think that a court, when exercising this special statutory jurisdiction, has any right or authority to enter an order of the character prayed for in the petition. In many cases that might be suggested it would result in great injustice. To the suggestion that in order to avoid such results the court should go on and consider all conflicting claims and titles, the answer is, as already indicated, the statute

under which the court acts, confers no authority to do so. In addition to this, it is apparent that if such claims were permitted to be litigated in a proceeding of this kind, it would necessarily be productive of great inconvenience and delays in the settlement of estates, whereby the costs and expenses would be largely increased, and the creditors deprived of their just dues. The very reverse of this state of things is certainly contemplated by our entire probate system. A wise and sound policy, as well as common justice to creditors, clearly demands that the estates of dead persons should be wound up with all reasonable dispatch. This the legislature has accomplished, so far as it can be done, by favorable legislation looking to that end, and in giving effect to the statute in question no implications should be indulged in that would lead to a contrary result. Rorer, in his work on Judicial Sales, after recognizing the power and practice of courts of chancery to make orders of the kind sought to be obtained by this proceeding, says: "But these summary methods of putting a purchaser at a judicial sale into possession, or of forcing him to comply with his purchase, are not understood to be within the powers of a mere probate court making sales of a decedent's lands under the statute. The purchaser at such sales will be left to his remedy at law, by action of ejectment, or whatever legal remedy by action stands in lieu thereof, in case, as in some of the States, the action of ejectment be abolished." (Sec. 167.) This, we think, is the correct rule, and it fully supports what we have already said on the subject.

The judgment of the Appellate Court being in accord with this view of the matter, it will be affirmed.

Judgment affirmed.

Syllabus.

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THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *et al.*

v.

JOHN EININGER.

Filed at Ottawa May 15, 1885.

1. NEGLIGENCE—*to whom a want of care may be imputed—as, in the case of a boy under age.* Where there is no evidence of the want of capacity or discretion in a minor plaintiff suing a railway company for a personal injury from negligence, and he is present at the trial, and it appears that he was of such age and ability to care for himself as to be trusted by his parents to attend school in a large city, a considerable distance from home, and to go and return by himself, it was held error to instruct the jury that if they believed, from the evidence, that the plaintiff, at the time and place of the injury, was of such tender years, and was so immature, that the requisite capacity to exercise proper care was wanting, then the law would not impute negligence to him. While the same degree of care might not have been required of him as from a person of mature years, it can not be said that no negligence could be attributed to him.

2. SAME—*duty of railway to keep a flagman at a street crossing—as to persons not crossing the railroad, but walking along the track.* In a suit by a plaintiff, against a railway company, to recover for an injury received from a passing train at a public street crossing,—not in attempting to cross the track along the street, but while unlawfully walking along the track as a footway,—it was held error to instruct the jury that if the injury happened because of there being no flagman at the railroad crossing to give warning to those about to cross the street and railroad track of the approach of a train at the crossing, contrary to a city ordinance, then the plaintiff was entitled to recover.

3. A requirement of a railway company to keep a flagman at a public street crossing in a large city, to give warning of the approach of trains, is intended for the protection of persons crossing the railroad tracks at such crossing, and not for the benefit of persons walking along the railroad track, employing it as a foot-path. To the latter the company does not owe the duty in respect to a flagman.

4. SAME—*attempting to board a train while in motion.* In an action against a railway company to recover damages for a personal injury, on the ground of negligence, alleged to consist in not ringing a bell or sounding a whistle, in not having a flagman at the street crossing, and in running the train at a greater speed than six miles an hour, the company asked an instruction, based on evidence, as follows: "The jury are instructed, as a matter of law, that if, from the evidence, they believe that the injury to the plaintiff

was caused by his attempting to climb upon the train in question while the same was in motion, then he is not entitled to recover." The court refused to give the instruction as asked, but modified it by inserting after the word "motion," the words, "and that he was injured in consequence of his own negligence," and gave it as modified: *Held*, that the court erred in refusing to give the instruction as asked, and in modifying the same.

5. Evidence—*excluding part of a conversation.* In a suit against a railway company to recover for an injury by a passing train at a street crossing, the court admitted in evidence what a witness at the time said to the defendant's flagman in giving him, as the witness said, "quite a little talking to," and then excluded the flagman's reply that "the boy was hitching," it being contended that he was injured in attempting unlawfully to climb upon one of the cars while in motion: *Held*, that after admitting what the witness said to the flagman, it was error to exclude his reply.

Appeal from the Appellate Court for the First District;—heard in the court on appeal from the Superior Court of Cook county; the Hon. Elliott Anthony, Judge, presiding.

Mr. Thomas F. Withrow, and Mr. James C. Hutchins, for the appellant the Chicago, Rock Island and Pacific Railway Company, and Mr. Cyrus D. Roys, and Mr. Pliny B. Smith, for the appellant the Lake Shore and Michigan Southern Railway Company:

The rights of a lawful traveler and of a railroad company, at a public street, are mutual, and dependent upon each other. The traveler must exercise his right of crossing as expeditiously as possible, and in the proper manner. To such an one the railroad owes the duties imposed by law, of bell, or whistle, or flagman, but to no other. So a failure to observe these duties is not negligence as against any other than a lawful traveler upon the highway. It owes no such duty to one trespassing upon its property and violating the law. *Blodgett* v. *City of Boston*, 8 Allen, 327; *Tighe* v. *City of Lowell*, 119 Mass. 472; *Railroad Co.* v. *Backus*, 55 Ill. 379; *Chicago* v. *Starr*, 42 id. 174; *Railroad Co.* v. *Hall*, 72 id. 222.

In the case of a trespasser, the defendant is liable only for willful negligence. *Railroad Co.* v. *Jacobs*, 20 Ill. 478; *Rail-*

road Co. v. *Godfrey*, 17 id. 500; *Railroad Co.* v. *Hetherington*, 83 id. 510; *Railroad Co.* v. *McKenna*, 14 Bradw. 472.

Age can not supply the negligence of the defendant. If the plaintiff was injured in attempting to climb upon the train while in motion, he can not recover, whether old or young, unless the company was willfully negligent. And if there is no negligence, there can be no liability, no matter how severe the injury, or whether the party injured was capable of exercising care for his safety or not. *Railroad Co.* v. *Stumps*, 53 Ill. 367.

The declaration alleged that the plaintiff exercised ordinary care, and the jury should have been instructed that it was his duty to have exercised such care. "Ordinary care" means the care and caution ordinarily exercised by persons of common prudence. *Railroad Co.* v. *Miller*, 25 Mich. 274; *Railroad Co.* v. *Lee*, 68 Ill. 576; *Railroad Co.* v. *Johnson*, 103 id. 512; *Railroad Co.* v. *McKenna*, 14 Bradw. 472; *Railway Co.* v. *Wallace*, 110 Ill, 114; *Honeysberger* v. *Railroad Co.* 40 N. Y. 574.

As to what is negligence in a person attempting to cross a railroad, see *Miller's case*, 76 Ill. 280; *Gretzner's case*, 46 id. 86; *Manly's case*, 58 id. 306; *Damerell's case*, 81 id. 454; *Hetherington's case*, 83 id. 515; *Bell's case*, 70 id. 106; *Lee's case*, 68 id. 585; *Dimick's case*, 96 id. 45; *Austin's case*, 91 id. 35; *Sutherland's case*, 2 Bradw. 313; *Rudell's case*, 100 Ill. 610.

The statements of the flagman after the injury, were improperly given in evidence. *Railroad Co.* v. *Riddle*, 60 Ill. 53; *Railroad Co.* v. *Martin*, 11 Bradw. 386; *Railroad Co.* v. *Carrow*, 73 Ill. 348; *Railroad Co.* v. *Gougar*, 55 id. 503.

Mr. Edgar Terhune, for the appellee:

What would be negligence on the part of an adult, would not be considered such in the plaintiff. *Thurbar* v. *Railroad Co.* 60 N. Y. 326; *Dowley* v. *Railroad Co.* 90 id. 670.

It must be remembered that the word "negligence" presupposes a mental capacity, and an ample opportunity to judge evil and danger, and reason from cause to effect.

But counsel claim that the plaintiff did not exercise all of the care which could be charged to him, because the evidence does not show that he looked and listened. In every instance, in the cases cited in support of that view, the party guilty of negligence was an adult, or of mature intellect and experience, and the cases cited are so manifestly inapplicable as to render further comment unnecessary.

The failure to keep a flagman, and to give notice of danger, as required by the ordinance, make out, *prima facie*, a case of negligence. *Railroad Co.* v. *Payne*, 59 Ill. 542.

Mr. Justice Sheldon delivered the opinion of the Court:

This was an action in case, for an injury received upon what are alleged to be the tracks of the defendants, the Chicago, Rock Island and Pacific Railway Company, and the Lake Shore and Michigan Southern Railway Company, by an engine and train of the Chicago and Alton Railway Company. The plaintiff recovered, the judgment was affirmed by the Appellate Court for the First District, and the present appeal taken to this court. The plaintiff sues as a minor, by his next friend.

The accident occurred at about four o'clock in the afternoon, in the city of Chicago. The train causing the injury was a freight train. The claim of the declaration is, that the plaintiff received his injury while, with all due care, he was walking along Twenty-fourth street, at a crossing of the same and the railroad track of the defendants. The defendants insist that the plaintiff was attempting, wrongfully, to climb upon the train, and slipped under one of the cars, thus receiving his injury, his leg being run over and broken. The tracks run north and south. Twenty-fourth street runs east

and west. The train was running south. The undisputed evidence shows that the plaintiff went upon the private right of way of defendants at Polk street, a considerable distance north of Twenty-fourth street, and walked south from Polk street, along the track, to near Twenty-fourth street; that he lived still further south, and was walking in a southerly direction.

The fourth instruction given for the plaintiff was:

"If the jury believe, from the evidence in this case, that the plaintiff was, at the time and place when the alleged injury is in the declaration alleged to have occurred, of such tender age, and was so immature, that the requisite capacity to exercise proper care was wanting, then the law will not impute negligence to him."

It was error to give this instruction. There was no evidence as to the age or capacity or discretion of the plaintiff introduced, more than that witnesses spoke of him as a little boy. He was, however, present in court at the trial. It appeared that he was of such age, and ability to care for himself, as to be intrusted by his parents to attend school in a large city, at a considerable distance from home, and to go and return by himself. He was, at the time, on his return from school. There was nothing in the case tending to show that negligence was not imputable to the plaintiff by reason of his incapacity to exercise care, and such a question should not have been submitted, by instruction, to the jury. The same degree of care might not have been required from the plaintiff as from a person of mature years, but the idea that no negligence at all could be imputable to him, was inadmissible.

The fifth instruction was to the effect that if the injury happened because of there being no flagman at the railroad crossing at Twenty-fourth street, to give warning to those about to cross the street and railroad track, of the approach

of a train of cars to the crossing, contrary to the city ordinance, then the plaintiff was entitled to recover. Evidence on the part of the defendants showed that at the time plaintiff was struck, he was traveling laterally along and upon the railroad right of way, for his own convenience. Under such circumstances, plaintiff was not a lawful traveler upon the highway. To such an one the railroad company does not owe the duty in respect to a flagman. Flagmen are for the protection of persons crossing railroad tracks, and are not for the benefit of persons walking along and upon a railroad track, employing it as a foot-path. This instruction was calculated to mislead in this respect, and should not have been given.

The defendants asked the court to give the following instruction to the jury:

"The jury are instructed, as a matter of law, that if, from the evidence, they believe that the injury to the plaintiff was caused by his attempting to climb upon the train in question while the same was in motion, then he is not entitled to recover, and your verdict should be for the defendants."

The court refused to do so, but modified the instruction as asked, by inserting in the line next to the last, after the word "motion," the words, "*and that he was injured in consequence of his own negligence*," and as thus modified, gave the instruction to the jury. The defendants were liable only for negligence. Negligence is the breach of a duty which one owes to another. The only acts of negligence charged against the defendants were, not ringing a bell or sounding a whistle, not having a flagman at the crossing, and running at a greater rate of speed than six miles an hour,—and there was no evidence tending to prove any other. The defendants owed no such duty as the breach of is here charged, to any trespasser attempting to climb upon their trains. There was nothing of a willful or wanton character on the part of the defendants

in producing the injury pretended. The wrongful climbing upon the train was, further, in violation of the law of the State, punishable by fine or imprisonment. (Rev. Stat. 1874, chap. 114, secs. 50, 56, p. 810.) The instruction as asked was correct, and should have been given, pure and simple. (*Illinois Central Railroad Co.* v. *Hetherington*, 83 Ill. 510; *Chicago and Northwestern Railroad Co.* v. *Scates*, 90 id. 586.) There was evidence in the case which required the giving of the instruction, if it was correct. The modification of the instruction took from it all its point as an instruction, and rendered it confusing and misleading to the jury. The mischief of the modification becomes the more palpable when taken in connection with the fourth instruction for the plaintiff, which has been considered, suggesting that the jury might find that plaintiff, by reason of his immature years, could not be guilty of negligence of any kind.

We will rest with passing upon such instructions as we have, without considering others objected to; but this is not to be taken as an approval of the latter.

The court, against objection, permitted the witness Prussing to state what he said to the flagman in giving him "quite a little talking to," as the witness phrased it, and then the court excluded the reply the flagman made, that "the boy was hitching." After admitting what the witness said to the flagman, it was error to exclude the latter's reply.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

ISAAC P. DAVIS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa May 15, 1885.

1. CRIMINAL LAW—*in case of homicide—proof of character of deceased as a peaceable man, and the contrary.* Where a defendant on trial for the murder of his brother proved that the deceased was regarded as a "good man in a fight," and many other things that tended to show his character as a quick-tempered, violent and rash man, it was *held*, that there was no error in allowing the prosecution, in rebuttal, to prove the character of the deceased as a peaceable man.

2. SAME—*treatment of deceased by defendant.* In the same case it was held that evidence of the manner in which the defendant had previously treated the deceased, being wholly immaterial, was properly excluded.

3. SAME—*defining the various grades of the offence—instructions.* On the trial of one for murder, where the evidence clearly showed the homicide was either murder or voluntary manslaughter, an instruction defining voluntary manslaughter need not also define involuntary manslaughter. To do so would be to call the attention of the jury to a principle of law not applicable to the facts, and would tend to confuse rather than enlighten them as to the real issue.

4. An instruction in such case, telling the jury that they must believe, from the evidence, that the killing "was done in sudden heat of passion apparently sufficient to make the passion irresistible," to make it manslaughter, is not subject to the objection that it requires the defendant to show the existence of a passion absolutely irresistible, to reduce the killing to manslaughter; and it is not faulty in failing to state the law of self-defence, when that is stated in other instructions.

5. SAME—*reasonable doubt.* The law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt, before they can find the accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case.

6. INSTRUCTIONS—*degree of accuracy required.* The correctness of instructions is to be tested by the evidence and facts in each particular case. They will be sufficient if they state the law with reasonable accuracy, in view of the evidence in the case. To require absolute technical accuracy in all cases, would be, under the administration of the criminal law, so difficult, as to make it almost impracticable to secure a conviction.

7. SAME—*assuming a fact not disputed.* Even if an instruction given on the trial of one for murder should assume the fact that the killing was shown by the evidence, where the fact of the killing is not a disputed fact, but is conceded, that would afford no ground of error.

WRIT OF ERROR to the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. MCKENZIE & CALKINS, and Messrs. GRIER & DRYDEN, for the plaintiff in error.

Mr. GEORGE HUNT, Attorney General, for the People.

Mr. JOHN W. MATTHEWS, State's Attorney, also for the People.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

At the January term, 1884, of the Warren county circuit court, an indictment was presented, in open court, by the grand jury, charging Isaac P. Davis with the murder of James K. Davis. In the first count of the indictment it is charged the murder was committed with a "single-tree," in the second that it was done with a "false standard of a wagon," and in the third that it was done with a deadly weapon to the grand jury unknown. At a trial of the cause had at the September term, 1884, defendant was found guilty of manslaughter, in manner and form as charged in the indictment, and the jury, by the verdict, fixed the term of punishment defendant should suffer, at five years in the penitentiary. The motion made by defendant for a new trial was overruled, and the court pronounced judgment on the verdict. To reverse the judgment against him, defendant brings the case to this court, on error.

Much stress is laid on the point made the verdict is not warranted by the evidence, and therefore it was error in the court to overrule the motion made for a new trial. The earnestness with which this point in the case is pressed on

the attention of the court, has induced a most careful examination of all the evidence contained in the record. It is seen that much of it is irrelevant, and illustrates no phase of the case. The killing took place in the field, where defendant and his hired hand and two little sons were gathering corn. These were all the persons that witnessed the affray. Only a brief period elapsed from the time deceased came into the field until he was struck down with a single blow, that proved mortal. It would seem the details of the sad controversy between defendant and the deceased might be briefly told by the few persons present, and yet this record contains many hundred pages of testimony, closely written. Really what occurred in the field where the mortal combat took place was briefly told, for the facts were necessarily few, and could be readily stated, as was done by the witnesses. This immense volume of testimony consists mostly of contradictory statements of many of the witnesses, and of the details of matters occurring elsewhere. Voluminous as the record is, it has been patiently examined, with a view to see whether the verdict is warranted by the whole evidence, and the conclusion reached from such examination is, the verdict is fully sustained.

It would answer no good purpose to enter upon any close analysis of the entire testimony. Only those facts occurring in the field are important to be considered. It is proved deceased entered that field alone, and was carried home in an insensible state, from which he never recovered. No one in his interest was present to give his version of what took place. The history of what occurred comes alone from defendant, his two little sons, and the hired-man. Counsel concede, as the truth is, there is a conflict in the evidence, not only as to which of the brothers began the affray, but also as to its cessation and renewal. No two of the witnesses state what occurred, precisely alike. This is not a matter that militates against the truthfulness of their respective statements. The

events occurred rapidly, and were of the most exciting character. It is no wonder the persons that witnessed the affray may not have been able to describe all that took place, exactly alike. It would have been singular if they had done so. As to the principal fact that defendant struck the fatal blow that caused the death of deceased, there is no controversy. It is an admitted fact. But with what instrument,—whether a false standard from the wagon, or a single-tree,—deceased was struck, or whether deceased was pursuing defendant, or defendant was pursuing deceased, at the time the blow was struck, are all matters about which the evidence is conflicting. Controversy as to what instrument was used to inflict the wound arose at the inquest that was held over the body of the dead man. The manner in which the witness McManus (defendant's hired-man,) was examined, shows that in some way it had already become understood, or was suspected, the blow was given with a single-tree. This is evident from the fact the witness was examined concerning that matter, and he denied he had told any one defendant took the single-tree off the wagon, or that he told him to do it. How did it become so soon suspected the single-tree was used by defendant? Some one must have told or suggested it. Witnesses say defendant himself told it the night on which his brother's death occurred, but this defendant denies. It is clear the controversy as to the weapon used did arise at the time or before the inquest was held, and it is a most significant fact neither defendant nor McManus stated at the inquest what instrument was in fact used, nor did either of them say the single-tree was not used. Both defendant and McManus stated more in detail what occurred in the field, in their examination at the trial, than at the inquest, or else their testimony is more fully reported on the latter occasion. An effort was made to break the force of the testimony of McManus, as given on the trial, by a most severe cross-examination, and by proving many contradictory statements made by him out

of court concerning the case and as to what his testimony would be. It must be admitted the witness McManus made many conflicting statements concerning the facts of the case, some of them in regard to material matters, and others as to matters wholly immaterial. Some denunciation of this witness is indulged by counsel, and yet not one of his neighbors, in the midst of whom he lives, is found to say his character for truth and veracity is bad. That his testimony on the trial and at the inquest is different concerning some material facts, may be admitted; and yet, when his statements as to what did actually occur in the field are subjected to a close scrutiny, it will be seen there is very little that is variant. As reported, his first examination was very meagre, and it may be he omitted to state many things at the inquest that he afterwards stated on the trial. It is this omission to state all that occurred that makes his testimony seem to be so very different on his last examination. On the trial the testimony given by McManus at the coroner's inquest was introduced in evidence by defendant himself, so the jury had an opportunity to see wherein it was variant, as to all material facts, from that given on the trial. The witness confesses, without reserve, his statements at the inquest were not *all* the truth,—that he suppressed much that was material. At the time, he was in the employ of defendant, and was induced, as he says, by the earnest entreaties of defendant and his family, to suppress many material facts before the coroner's inquest, as he did. The reason assigned for his action in that respect is not without something in its support that palliates it, but of course not enough to justify it. It was an hour of intense excitement to all concerned, and defendant and his family were overcome by the distress that had come upon them. It is by no means unnatural the witness should feel inclined to favor defendant so far as he could, and in that way relieve defendant from the shock of a great sorrow that had so recently and so suddenly come upon him.

It will be seen that on the trial the witness McManus assumed to state all that occurred between the brothers in the field. According to his testimony, deceased had ceased the quarrel with defendant, and was standing still on ground he claimed to have in his rightful possession; that he warned defendant not to strike him; that he told him he was unarmed, and that while standing in that position defendant deliberately struck him a blow with a single-tree, that shortly produced death. This account of the manner of the killing was not given by the witness at the inquest, and for that reason it is said he is unworthy of belief. The force of the argument on this branch of the case may be admitted in a measure, but not to the extent insisted upon. It is quite certain the jury did not give full credence to the details of facts occurring in that fatal field as given by McManus on the trial, or else it is hardly probable this verdict would ever have been for manslaughter. As the facts are stated by McManus on the trial, the killing was deliberate, willful murder. But the jury no doubt took another view of the case,—that the killing was done in the midst of a heated quarrel between the brothers, and the crime was therefore manslaughter. This, indeed, is a most favorable view for defendant. Considering the testimony of McManus, both before the coroner and at the trial, and that given by defendant himself at the inquest, in connection with the facts and circumstances proven about which there is and can be no controversy, this verdict is not only warranted, but one imposing a much severer punishment might be sustained. It appears that when deceased came into the field a heated controversy at once arose between the brothers concerning the corn. Angry words passed, and according to the testimony of McManus before the coroner, the first overt act of violence was committed by defendant. It is said defendant pulled a false standard out of the wagon and raised it over the head of deceased, and told him to go home, and then deceased took after the accused, and run him

around the wagon. The witness was not positive that deceased had a knife in his hand,—saw something he thought was a knife, but was not positive it was not a husking-peg. The witness further says: "They seemed to be dodging around wagons,—each dodging from the other. Isaac was in front when they started. Do not know which was in front when they left the wagons." Again he says: "The fight lasted not more than ten minutes, and they ran after each other, trying to strike each other. Saw James (deceased) try to get the wrench out of the wagon, but he did not get it out entirely, as he dodged from there, and seemed in a hurry." Witness thought the deceased was to blame for starting the trouble, but admits he told Mrs. Davis "one was as much to blame as the other, as they were both in a passion." In his examination before the coroner, McManus does not state whether he saw the blow struck or not. The parties were some distance from the wagons, and when he was called he went to them, and found deceased on the ground, unable to speak. The testimony of defendant taken by the coroner was introduced in evidence by the prosecution. As it was given so soon after the occurrence, and when every fact must have been vividly present to his mind, it can certainly be relied on as not unfavorable, at least, to defendant. It was given at an hour and in a presence when no man could well dissemble. Even his own account of what transpired, standing alone, if there were no other evidence in the case, does not excuse his conduct, when considered in connection with facts and circumstances proven past all doubt. It is here defendant testifies he ran around the wagons "as much as twice, and then turned and ran down the corn—down the row—and he (deceased) after me, for about fifty yards; then I stopped, turned around, and struck him with something,—don't know what. He was advancing toward me when I struck him, and he fell." And then it is added: "Can't say I saw the knife, when I turned on him. Have not seen it since.

Have not been there since. Had club, or whatever it was, in my right hand. Know I grabbed for false stake in wagon, but don't know whether I got it or not." It is evident the account given by McManus and defendant, at the inquest, does not contain all that transpired on that fatal field. Something more occurred than what either of them disclosed on their first examinations. Whether all that McManus related on the final trial took place, it is obvious the history of the affray was imperfectly given at the inquest, or else what the witnesses stated is not preserved in the record. So far as they undertook to state the facts, both witnesses may have been candid, and yet they may have omitted much that was material. Neither witness ventured to state with what instrument the blow was inflicted. This is a most singular omission. Their testimony was taken in less than twenty-four hours after the affray, and it seems incredible the witnesses did not know what weapon was used. One or the other, or both, of these witnesses must have known. But a statement of defendant that challenges belief is, that he did not know with what instrument he struck the blow that killed his own brother. He knew and admitted he "grabbed for the false stake" in the wagon, but adds, "don't know whether I got it or not." This exact statement was repeated on the trial, and when asked, "What did you strike him with?" he answered, "I will never tell you." The reason assigned why he did not tell was, because, he said, he did not know. The witness McManus, on the trial, said the fatal blow was given with a "single-tree." The only denial defendant makes of this statement of McManus is, that he "don't know." It may have seemed incredible to the jury a man who had just slain his brother could not, or would not, tell how and with what it was done, and for that reason they may have concluded it was done, as McManus said it was, with a "single-tree." If so, it was one of the strong criminating circumstances in the case.

But there is another criminating fact, the force of which can not be avoided, that depends for its existence neither upon the testimony of defendant nor McManus, and concerning which all the evidence concurs. It is, that deceased was killed with a single blow, and that was on the back of the head, and whether the wound was inflicted with a "false stake" or a "single-tree," matters little. The theory of the defence insisted upon by the evidence of defendant, and in the argument of counsel, is, that defendant was so hotly pursued by deceased through the corn, from the wagons, where the affray began, that danger to life, or great bodily harm, became imminent, and he "turned and struck" him. Is this theory consistent with the fact deceased was struck but a single blow, and that on the back part of the head? No wounds appeared elsewhere on his person. Had it been true deceased was pursuing defendant, and was so close upon him as to place his life or limb in imminent peril, is it probable, or even possible, he could have turned and struck deceased on the back of the head, if he was advancing upon him as defendant says he was? As before stated, defendant says he held the instrument, whatever it was, with which the blow was struck, in his right hand, and McManus, in his testimony on the trial, says defendant passed around deceased to the left,—and that would enable him to give the blow precisely as all the surgeons located the wound that was inflicted. Indeed, it seems improbable it could have been inflicted otherwise. If it shall be assumed, according to the theory of the defence, that deceased was pursuing defendant, and was pressing hard upon him when he "turned and struck," in all probability the blow would have fallen on the front or side rather than on the back of the head. The instinct of self-preservation, in the immediate presence of imminent peril, would have caused deceased to throw up his arms, and in that way much of the force of the blow would in all probability have been received upon his arms, or at least upon the front part of the head. All the

reasonable probabilities support the testimony of McManus that defendant passed around to the left of deceased, and from that position it was practicable to inflict the blow, as was done, on the back of the head. Any other theory seems inconsistent with the location of the mortal wound. Assuming, then, as may be done consistently with the weight of the evidence, that defendant passed around to the left of deceased, and struck him with an instrument which he held in his right hand, the guilt of defendant is established beyond all cavil. It rebuts the idea deceased was pursuing defendant, and was pressing so close upon him as to place his life or limbs in imminent peril, when he turned and struck, and that being so, the conviction was warranted both by the law and the facts.

Coming now to consider other questions made on the record, the first point made is, the court erred in admitting evidence for the People, and refusing to permit proper evidence to go to the jury, for defendant. It seems defendant had proved deceased was regarded as a "good man in a fight," and many other things that tended to show his character as a quick-tempered, violent and rash man. After such evidence had been admitted, the prosecution was permitted to prove the character of deceased as a peaceable man, and this is the evidence that is complained of as being incompetent and hurtful. What defendant proved concerning deceased was equivalent to proving his general character as a violent and fighting man, and there was certainly no serious error, if there was any at all, in permitting the prosecution to rebut such evidence of character by proving, as was done, his general character as a quiet and peaceable man. Indeed, it is not perceived how else it could be so well disproved. At all events there was nothing in the evidence that could prejudice the defence defendant was endeavoring to make, and there is no just ground for complaint on that score.

There was clearly no error in the ruling of the court in excluding evidence of the manner in which defendant had

treated deceased. It was wholly immaterial whether defendant's conduct in the respect indicated afforded deceased any reasonable ground for complaint or not, and the court was clearly right in not permitting that matter to be investigated.

Another ground of reversal insisted upon is, the court improperly instructed the jury, on behalf of the People, and particular attention is called to instructions numbered, respectively, 4½, 5, 7, 9 and 11, as manifestly misleading, erroneous, and prejudicial to defendant. On this branch of the case it might be sufficient to say the several instructions have been carefully considered, and it is not perceived they contain anything prejudicial to the defence sought to be made. It might be some of them, as now framed, would not be regarded as stating the law as fully and accurately as should be done if given in another case where the evidence was widely variant from what it is in the case being considered. In view of the evidence contained in this record, the instructions state the law applicable to the facts with sufficient accuracy, and that is all defendant has any right to insist upon. Many of the objections taken to the instructions are hypercritical, and if sustained in this and other cases, it would render the administration of the criminal law so difficult as to make it almost impracticable to secure a conviction of the wrongdoer, however clearly he may be proved to be guilty. Such strictness the law will not tolerate.

It is said instructions 4½ and 5 do not fully inform the jury as to the law of manslaughter. One of these instructions contains a definition of manslaughter, voluntary and involuntary, in the precise language of section 43 of the Criminal Code, and although some objections are taken, it is apparent "voluntary manslaughter" is defined with sufficient accuracy. But the objection most strongly urged is, that neither by instruction 4½ nor instruction 5 did the court make even any attempt to inform the jury as to what constitutes "involuntary manslaughter." It was not necessary to define the latter

crime. The case made by the evidence was either murder or voluntary manslaughter. It contained not a single element, other than the killing itself, of involuntary manslaughter, and had the court specifically defined involuntary manslaughter, it would have answered no good purpose. It would have directed the attention of the jury to a principle of law not applicable to the facts of the case, and the result would have been to confuse rather than to enlighten them on the issue they were to try. It is said, also, the fifth instruction requires defendant to show the existence of a passion absolutely irresistible, to reduce the killing from murder to manslaughter. It requires no such thing. It simply tells the jury they must believe the killing "was done in sudden heat of passion, apparently sufficient to make the passion irresistible," and nothing more, and in this there was no error. The law of self-defence was embodied in other instructions given, and there was no necessity for embracing it in the fifth charge, as it is insisted should have been done.

It is said the seventh charge is erroneous, for the reason it assumes the fact the killing was shown by the evidence. If it were conceded the criticism was just, it could do defendant no possible harm, for the fact of the killing is not a disputed fact in the case, and never was. Defendant himself testified he struck deceased a blow that felled him to the ground. He was taken up in an insensible condition, and died before the next morning. It is preposterous to even argue the wound inflicted by defendant did not cause the death of the deceased. That is a fact not in dispute by any one, and if it had been, it was proved past all doubt. Nor is this instruction liable to the further criticism made upon it, that it conveys to the minds of the jury the idea defendant could not sustain his plea of justification unless the danger was not only apparently imminent, but was actual and positive. Fairly construed, it asserts no such principle.

The objections taken to the ninth instruction are too subtle to find any support, either in reason or in law. Whatever warrant there may be for any criticism upon this instruction, it is obvious it contains nothing hurtful to the defence.

Lastly, it is said the eleventh instruction given for the People was calculated to mislead, in that it gave the jury the privilege of deciding that any element in the case, the most material as well as the most trivial, has been established by proof less in quantity than the law requires. The objection taken is broader than is warranted by any fair reading of the instruction; but if it is intended to say the jury should be required to believe every fact in the case had been proved, beyond a reasonable doubt, before they could find the accused guilty, such is not the law. In *Mullins* v. *The People*, 110 Ill. 42, this court said: "The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused, on the whole evidence, and not as to any particular fact in the case." The doctrine of the case cited has been restated and approved in the recent case of *Leigh* v. *The People*, 113 Ill. 372. The principle of these cases is conclusive of the same point in the case being considered.

The court refused certain instructions asked by defendant, but in doing so there was no error. All they contained that was proper to go to the jury had been given in other instructions, and it was not error to refuse to give the same thing a second time.

Every argument and suggestion of counsel in behalf of defendant has been thoughtfully and patiently considered, and no tenable ground is perceived on which a reversal of the judgment could be based. It is said defendant is guiltless of any criminal intent. How that is, could only be ascertained from what he did, as shown by the evidence, and that leaves no doubt upon the mind, of his guilty conduct. The widest latitude was permitted to the defence, on the trial, to introduce any and everything that would tend in the slightest

degree to extenuate the conduct of defendant. The principal witness for the prosecution was subjected to an unreasonably extended cross-examination, and every fact and circumstance that would tend in the remotest degree to impair the force of his testimony was permitted to go in evidence, and yet a jury coming from the vicinage have found defendant guilty; and this court, after the fullest examination, can not say the verdict is not warranted by the evidence. It is possible, and it may be true, some trivial errors have intervened at the trial. That may reasonably be expected in every protracted trial. When no error has intervened that affects the merits of the case in any substantial degree, the judgment will not and ought not to be reversed. Defendant has had a full and fair trial, and that is all he has any right to demand. If he is now to suffer punishment, it is on account of his own wrongful conduct, from the effect of which he can not expect to escape.

The judgment will be affirmed.

Judgment affirmed.

THE SUN MUTUAL INSURANCE COMPANY

v.

THE SAGINAW BARREL COMPANY.

Filed at Ottawa May 15, 1885.

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132 488
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1. INSURANCE—*payment of premium to insurance broker—question of agency, and of evidence in respect thereto.* A party desiring to insure certain property, applied to an insurance agent of his place to procure the insurance, leaving him to select the company. He forwarded the application to certain insurance brokers in Chicago, who procured the policy in a company with which they had considerable dealing, and sent the same to the assured through the first named agents, and he sent the premium to the agents in Chicago, who never forwarded the same to the insurance company. The policy contained the usual clause that it should not be binding until the actual payment of the premium. A loss occurred, and payment was refused,

when suit was brought on the policy, and a recovery had: *Held*, that the liability of the insurance company depended upon the fact whether the Chicago agents were its agents, or were authorized to receive payment in its behalf.

2. Where insurance brokers procuring a policy of insurance received payment of the required premium, and failed to return the same to the insurance company, it was *held*, that the correspondence between the brokers and the company was proper evidence for the purpose of showing their previous relations and methods of business in respect to insurance effected through them, and as tending to show they were, in fact, agents of the company, and as such authorized to receive payment of the premium.

3. APPEAL—*reviewing questions of fact.* This court, in reviewing ordinary cases at law coming to it through the Appellate Court, sits simply to correct errors of law committed in the lower court. If the trial court makes no improper ruling, and the judgment is affirmed in the Appellate Court upon mere issues of fact, this court will not reverse on the ground that the issues were improperly decided. And this is equally so although there may be no conflict in the testimony on which the issues are found.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. W. H. BARNUM, Judge, presiding.

Messrs. SCHUYLER & KREMER, for the appellant:

If the brokers in Chicago were agents of the insurance company, and the premium was paid to them, the company was liable, even if it never got the money from its agents. But if Beardsley & Circle were not defendant's agents, but mere street brokers, no recovery can be had. *Fire Ins. Co.* v. *Swigert*, 11 Bradw. 599; *Insurance Co.* v. *Ward*, 90 Ill. 548; *Insurance Co.* v. *Weary*, 4 Bradw. 78; *Insurance Co.* v. *Rubin*, 79 Ill. 402; *Whiting* v. *Insurance Co.* 129 Mass. 240.

The correspondence of Beardsley & Circle with appellant, in respect to their prior dealings, was not admissible in evidence. *Lund* v. *Tyngbourough*, 9 Cush. 36.

Messrs. PADDOCK & ALDIS, for the appellee, reviewed appellant's authorities, and discussed the propositions of law, generally.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The Saginaw Barrel Company, a manufacturing corporation of Saginaw, Michigan, being desirous of procuring $2000 additional insurance on its factory buildings and machinery, on the 19th of August, 1882, applied to Gaylord & Fowler, insurance agents of that place, and directed them to procure the amount of insurance mentioned, from some good and responsible company, leaving the selection of the company entirely to them. Gaylord & Fowler thereupon wrote to Beardsley & Circle, insurance brokers doing business at Chicago, requesting them to obtain the required insurance. On the 25th of August, 1882, Beardsley & Circle, the Chicago brokers, sent the application for the insurance in question to the Sun Mutual Insurance Company of New Orleans, with which they already had a business acquaintance and were then doing considerable business. The amount of premium not being deemed sufficient, the application was returned, with a statement to that effect. This being satisfactorily arranged, the insurance company, on the 2d of September following, issued to the barrel company a policy of insurance on its factory building and machinery, for the amount above mentioned. The policy, instead of being sent directly to the barrel company, at Saginaw, was forwarded to Beardsley & Circle, at Chicago, according to the usual course of business between them and the insurance company. They transmitted the policy to the barrel company through Gaylord & Fowler, and the premium was paid by the assured, through them, to Beardsley & Circle, at Chicago, but it was never paid by Beardsley & Circle to the insurance company. After the insurance had been thus effected, the assured, through Gaylord & Fowler, sent the policy to the insurance company, with the request to indorse thereon, "loss, if any, payable to A. W. Weaver and A. A. Brockway, as their interests may appear," which was done, and the policy returned, but nothing was

said about the premium not having been paid. On the 8th of December the property insured was destroyed by fire, after which some correspondence took place between the insurance company and Circle in respect to the premium, but no complaint was ever made to the assured, prior to the loss, that the premium had not been paid. The insurance company having declined to pay the loss on the sole ground that the premium had not been paid, the present action was brought by the assured, in the circuit court of Cook county, to recover the same. By agreement of parties, the cause was tried by the court, without a jury, resulting in a finding and judgment for the plaintiff for $1750.55, which was affirmed by the Appellate Court for the First District, and the defendant has appealed to this court.

The policy in question contains the usual provision that it is not to be binding until the actual payment of the premium. It follows, therefore, that if the payment by the assured to Beardsley & Circle was not, in law, a payment to appellant, the judgment of the circuit court is erroneous, and the Appellate court erred in not reversing it. Whether it was such a payment or not, of course depends upon the further question whether Beardsley & Circle, in view of their previous course of dealing with the insurance company, and in the light of all the circumstances disclosed by the testimony, are to be regarded as its agents in accepting and receiving the premium, which is conceded to have been paid to them, for the company,—or, more shortly put, whether, as a matter of fact, they were authorized by the appellant to receive the premium in question. This was a question of fact for the court sitting as a jury, and whether properly or improperly decided, is not a matter for the consideration of this court. If an error in this respect was committed, as is claimed there was, its correction was committed by law to the Appellate Court, and not to this, and the decision of that court is consequently final. Nor can it avail appellant anything even if it be con-

ceded there is no conflict in the testimony, as has often been decided by this court. This may well be, and yet the controverted facts to which the evidence relates may have been very difficult of solution. This is often the case. Some of the evidence, for instance, may tend to prove a particular hypothesis, while other portions may tend to prove just the contrary. When this is the case, it is for the jury, or court sitting as a jury, to weigh the evidence, reconcile it, if it can be done, and endeavor to draw from it, as an inference of fact, the true conclusion. We must assume that has been done in this case. This court, in reviewing cases at law coming before it through the Appellate Court, sits simply to correct errors of law committed by the lower courts. If the trial court makes no improper ruling, and the case is affirmed upon mere issues of fact, this court will not reverse on the ground those issues were improperly decided.

The only question of law presented by this record arises on an exception taken to introducing in evidence the correspondence between appellant and Beardsley & Circle, for the purpose of showing their previous relations and methods of business in respect to insurance effected through their instrumentality. We think the evidence was proper for the purpose offered.

The court was not asked to hold any propositions of law as applicable to the case, or to otherwise make any ruling complained of, besides that just mentioned.

Perceiving no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus. Brief for the Appellant.

LEWIS L. COBURN

v.

ALMIRA HERRINGTON.

Filed at Ottawa May 15, 1885.

1. ACKNOWLEDGMENT OF DEED—*requisites—to release dower—under act of 1853.* Under the act of 1853, relating to conveyances, the certificate of the acknowledgment must show that the wife of the grantor joining with him in a deed was personally known to the officer taking the acknowledgment, or proven by a credible witness, in order to release or bar her dower.

2. DOWER—*effect of subsequent deed for other property.* Where the certificate of the acknowledgment of a deed made by a husband and wife, of a tract of land, is invalid as to the wife, so that the deed fails to release her dower in the premises, a subsequent deed made by her to the same grantee, for other real estate, is not admissible in evidence against her in a suit by her for the assignment of her dower in the first named tract.

3. SAME—*as to land held in severalty—against whom the dowress may proceed.* Where land in which a widow is entitled to dower, has been divided, by partition, between several different parties, she may properly bring a separate suit against the owner of each portion. She may, perhaps, proceed against all in one suit, but she is not compelled to do so.

APPEAL from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. LEWIS L. COBURN, *pro se*, contended that the certificate of the acknowledgment of the deed of Nathan P. Herrington, and Almira, his wife, was substantially good under the law of 1853, which declared that no deed, etc., should be held invalid, defective or insufficient by reason of any informality or omission in setting forth the particulars of the acknowledgment,—citing and reviewing the following cases: *Lindley* v. *Smith*, 46 Ill. 523; *Gove* v. *Cather*, 23 id. 634; *Heinrich* v. *Simpson*, 66 id. 57; *Tully* v. *Davis*, 30 id. 103.

Also, that the tract of land was owned by several parties in severalty, and that all the owners should be made parties.

Messrs. FRENCH & HALSEY, and Mr. D. B. SHERWOOD, for the appellee:

As to the sufficiency of an acknowledgment in the form of the one under discussion, we have only to refer to *Brown* v. *Thompson*, 46 Ill. 214, *Lindley* v. *Smith*, id. 523, *Tully* v. *Davis*, 30 id. 103, *Heinrich* v. *Simpson*, 66 id. 57, *Ridgway* v. *Underwood*, 67 id. 419, *Murphy* v. *Williamson*, 85 id. 149, and *Hogan* v. *Hogan*, 89 id. 431.

Proceedings for dower may be against the owner of each separate tract of several, or the dowress may proceed against all jointly. *Allen* v. *McCoy*, 8 Ohio, 418; *Barney* v. *Frowner*, 9 Ala. 901; *Boyden* v. *Lancaster*, 2 P. & H. 198; *Potter* v. *Wilson*, 13 Mass. 504; *Blossom* v. *Blossom*, 9 Allen, 254.

The deed to Moore did not embrace this land.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill brought by Almira Herrington, against appellant, for the assignment of dower in certain premises in Chicago. The case was before us at a former term, and is reported in 108 Ill. 613. When the case was here before, the main question in dispute was as to the effect of a decree of partition upon appellee's claim for dower, neither appellee nor her husband having been a party to the decree. We then held that appellee was not concluded by the decree of partition, and the decree dismissing the bill was reversed, and the cause remanded for another hearing. On the second hearing a decree was rendered in appellee's favor, and Coburn, the defendant in the bill, appealed.

The appellee claimed dower in the premises as widow of Nathan P. Herrington, deceased, who during his lifetime was seized in fee of the premises, and conveyed the property to Luther Dearborn, on May 31, 1857. Appellee joined in the deed, and her claim for dower rests upon a defect in the acknowledgment of the deed. The certificate of acknowledgment is as follows:

"STATE OF ILLINOIS, } ss.
Whiteside County. }

"I, John M. Brown, a justice of the peace in and for said county, in the State aforesaid, do hereby certify that Nathan P. Herrington, personally known to me as the same person whose name is subscribed to the foregoing instrument of writing, appeared before me this day, in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth. And the said Almira Herrington, wife of the said Nathan P. Herrington, having been by me examined, separate and apart and out of the hearing of her husband, and the contents and meaning of the said instrument of writing having been by me made known to her, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned without compulsion of her said husband, and that she does not wish to retract the same.

"Given under my hand and seal, this 18th day of April, A. D. 1857. JOHN M. BROWN, *J. P.* [Seal.]"

The act of 1853, regulating conveyances in this State, (Laws of 1853, p. 89,) was in force at the time the deed in question was acknowledged. This act provides that no officer shall take the acknowledgment of any person to any deed unless the grantor shall be personally known to the officer, or shall be proved by a credible witness; and the officer shall state in his certificate that such person was personally known, etc. It also provides that a married woman may release her dower in lands by joining with her husband in a deed of conveyance, and appearing before an officer and acknowledging such deed; and if such woman shall not be personally known to the officer to be the person who executed the deed, he shall ascertain the fact by the testimony of a competent witness; and if the woman acknowledges, on an examination separate and apart from her husband, that she executed the deed and

relinquished her dower, the officer shall annex a certificate to the deed, stating that such woman was personally known to him or was proven to be the person who subscribed the deed, etc. This act clearly and explicitly requires the certificate of the officer to show that the wife was personally known or proven by a credible witness, in order to release the dower, and as the certificate of acknowledgment does not comply with the statute in this regard, it was not sufficient to bar her dower in the premises conveyed. This question has been decided by this court in a number of cases, in some of which dower, only, was involved, while in others the question was whether the fee of a married woman would pass where the certificate of acknowledgment was defective. *Lyon* v. *Kain*, 36 Ill. 363; *Lindley* v. *Smith*, 46 id. 524; *Heinrich* v. *Simpson*, 66 id. 57.

After the partition proceedings, Almira Herrington made Luther Dearborn a quitclaim deed of the lots which had been assigned to him. This deed appellant offered in evidence, but the court excluded it, and the decision is claimed to be erroneous. If the deed had embraced any of the property involved in this case, then it would have been proper evidence; but as it did not, the deed could have no bearing whatever on the rights of the parties. The fact that appellee released her title and interest in certain lots owned by Dearborn, could not in any way affect the property in litigation between her and appellant.

It is also contended that others who own a part of the same tract of land, are necessary parties to the proceeding. Where a widow has dower in a tract of land which has been divided between several different parties, she may properly bring a separate action against each owner. (*Allen* v. *McCoy*, 8 Ohio, 418.) Perhaps she might, if she saw proper, bring an action against all, but she was under no obligation to do so.

It is also said that under the evidence of Almira Herrington it does not appear that her husband had an interest in the

premises after the deed he and his wife made to Alexander B. Moore. It does not definitely appear from the evidence what property was conveyed to Moore,—or, at least, there is an entire want of evidence to show that Almira joined in a deed conveying the property involved in this action, to any person.

Some other questions have been raised, but they were disposed of when the case was before us at a former term, and it will not be necessary to go over them again.

The decree of the circuit court will be affirmed.

Decree affirmed.

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THE COVENANT MUTUAL BENEFIT ASSOCIATION OF ILLINOIS

v.

EDWARD J. SEARS *et al.*

Filed at Ottawa May 15, 1885.

1. INSURANCE—*mutual benefit association—contract construed as to payee or beneficiary.* A mutual benefit association, the charter and by-laws of which declared its object and business should be to afford financial aid and assistance to the widow, orphans, heirs or devisees of deceased members, issued a certificate of membership to a member, which provided that upon proof of his death, he having complied with its conditions, an assessment should be levied upon the surviving members to the amount of the certificate, ($5000,) which "sum so collected on such assessments (less expenses and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate-holder:" *Held*, that the promise was, in substance, to pay to his devisees if there should be devisees to take, and if not, then to pay to his heirs, and that they might recover on the same.

2. CHANCERY—*jurisdiction to enforce payment of benefits promied.* A mutual benefit association, a corporation not organized for pecuniary profit, having no surplus, and relying entirely upon mortuary assessments made upon each death of a member for the payment of benefits to the beneficiaries of decedent, gave a certificate of membership to a member, in the sum of $5000, whereby it promised, upon proof of his death, that an assessment should be levied upon the surviving members to the amount of the certificate,

which sum, when collected, less the expenses and collection costs, it would pay to his devisees, in case he left any, and if he left none, to his legal heirs. It was *held*, that a court of chancery might properly take jurisdiction of a bill brought by the heirs of the deceased member to enforce payment of the certificate, by compelling a specific performance of the contract.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. MCKENZIE & CALKINS, for the appellant:

Appellees claim that the amount named in the certificate is due and payable to them; that it is an executed contract; that they have fully performed the conditions, and that nothing remains but the payment of money. If so, their remedy is at law. *Jones* v. *Newhall*, 115 Mass. 97; *Lane* v. *Adams*, 19 Ill. 167; *Thomas* v. *Caldwell*, 50 id. 138; *Long* v. *Barker*, 85 id. 431; *Puterbaugh* v. *Elliott*, 22 id. 157.

When the consideration on the part of the plaintiff is executed, and the thing to be done on defendant's part is mere payment of a sum of money due immediately, this constitutes a debt, for which the plaintiff may declare in the general count of an *indebitatus assumpsit*. *Canal Co.* v. *Knapp*, 9 Pet. 466; *Thomas* v. *Caldwell*, 50 Ill. 138; *Throop* v. *Sherwood*, 4 id. 98; *Walier* v. *Brown*, 28 id. 378; *First National Bank* v. *Hart*, 55 id. 62.

Then, if appellees, under the allegations of their bill, were entitled to recover, they had a clear and complete remedy at law, and could have filed a declaration in assumpsit, on the common counts, and obtained a judgment for the amount claimed, viz, $5000. Rev. Stat. 1874, chap. 10, sec. 10; *Insurance Co.* v. *Nelson*, 65 Ill. 417; *Life Ins. Co.* v. *Palmer*, 81 id. 91.

The fund in this case was made payable to "his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir." The contract must be held as expressing the entire and exact meaning of the parties,

and no evidence of extrinsic matters or usages can be received to vary its terms. *Fire Ins. Co.* v. *Eddy*, 49 Ill. 109; *Sanford* v. *Rawlings*, 43 id. 93.

Messrs. BENNETT & GREEN, for the appellees:

The remedy is not at law, as the contract named in the certificate is still executory. After judgment at law the beneficiary would have to resort to *mandamus*, as the corporation has no property or surplus, and relies entirely upon mortuary assessments for payment of benefits. *Mandamus* will not lie to enforce executory contracts. *People* v. *Delaney*, 96 Ill. 511.

A court of equity is the proper forum in which to enforce the certificate. The appellant is in effect a trustee, having control of a fund distributed among its certificate-holders, from which, and from which only, benefits can be paid, and it is especially appropriate that equity shall take jurisdiction over the same. Besides, as held in many States, an association organized for the purposes specified in the charter of the appellant, and one, especially, as stated in the by-laws, organized not for the pecuniary profit of its members, either is, or nearly approaches, the nature of a charity. *League Association* v. *People*, 90 Ill. 169; *Indianapolis* v. *Grand Master*, 25 Ind. 518; *Duke* v. *Fuller*, 9 N. H. 536; *Burdine* v. *Grand Lodge*, 37 Ala. 478.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery, brought by the heirs of Edward J. Sears, deceased, consisting of his father, mother and two sisters, against the Covenant Mutual Benefit Association of Illinois, to recover the benefit money of $5000 agreed to be paid by a certificate of membership in said association, issued to and held by said Sears at the time of his death. The circuit court decreed in favor of the complainants. The decree was affirmed by the Appellate Court for the Second District, and an appeal then taken to this court.

As declared by its charter and by-laws, "the object and business of this association shall be to afford financial aid and assistance to the widows, orphans, heirs or devisees of deceased members." The certificate of membership which was issued to the deceased in consideration of a membership fee of $10 paid, and of the payment of such other accounts for mortuary assessments, expenses and collection costs as might be required, constituted him a member of the association, with all the rights and privileges of the same, and provided that upon proof of his death, he having complied with the conditions of the certificate, an assessment should be levied upon the surviving members to the amount of the certificate, ($5000,) which "sum so collected on such assessments (less expenses and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit, to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate-holder." The deceased died intestate, never having been married, and leaving the complainants his only heirs.

It is admitted that there had been compliance on the part of the deceased with all the conditions of the certificate, and no question is made that if devisees were here suing they would be entitled to recover. But it is denied that heirs have any rightful claim to the money agreed to be paid by the certificate. The object of this association,—the very end of its being,—was to afford financial aid and assistance to the widows, orphans, heirs or devisees of its deceased members. This was done by means of the benefit money promised in members' certificates, which was paid over after their death. The deceased became a member for the sole purpose of securing the provision of this benefit money for one or more of said classes of persons which he might leave surviving him. The mortuary assessments, and other payments of money which he made, were for this purpose, and no other. It

would be a very hard construction, and defeat of intention, to hold that the heirs, the only class of the beneficiary persons the deceased left surviving him, should not take any of the money promised by the certificate, and that all the payments of money made by the deceased should have been for no purpose, merely because he had never made a will and had devisees. Such a construction surely should not be adopted, unless it is compelled by language which clearly will not admit of any other interpretation. The certificate provides that upon proof of the certificate-holder's death, an assessment shall be levied on the members for the full amount of the certificate. This implies that the money so raised is to be paid over to some one. Then comes the promise of the certificate that the association will pay the sum so collected on such assessments as a benefit to the decedent's "devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate-holder." It is true the letter is, that in the event of the prior death of the devisees, the money is to be paid to the heirs. But is it the meaning that the money was to be paid to the heirs only in the event of the prior death of devisees? The clear intent is, that either devisees or the heirs,—one or the other of them,—should take. The certificate appears to assume that there was a will, and devisees under it, and so provides for payment to them, or in the event of their prior death, to the heir of the certificate-holder. It would seem to be great violence to intention that the money should not be paid over, but that it should be held by and go to the association while there were heirs to take it. The meaning evidently was, that the money should go to devisees if there were devisees to take it, and that if there were not devisees to take it, then it should go to heirs. The circumstances of there having been a will, devisees under it, and their prior death, were not important. The essential thing was, there not being devisees to take, and not there having been devisees

and they having died. Non-existence, by the true meaning, was the same as prior death. The substantial promise was to pay to devisees if there were devisees to take, and if not, then to pay to heirs. We think this the fair and reasonable construction of the agreement, which, in view of the purpose of the association, may well be adopted.

Objection is made that a will may hereafter appear, and the association be compelled to make re-payment of the certificate to devisees. There is a possibility of this, but no reasonable probability. The proof is quite satisfactory that there was no will. If there were reasonable ground of apprehension on this score, it might be proper to require indemnity against such a contingency. But we do not think it called for in this case.

Objection is taken to the jurisdiction of the court,—that there was an adequate remedy at law. The certificate of membership does not contain any contract to pay to the beneficiaries $5000, or any sum, absolutely, but to levy assessments, ratably, upon all members holding certificates in force at the death of decedent, for an amount not less than the limit of the certificate, and to pay over the sum so collected on such assessments, less the collection costs. As the corporation is not organized for "pecuniary profit," has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in, by assessment, for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy, by directing a specific performance of the contract of the defendant by the levying of the proper assessments.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiff in Error.

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MARY CLEAVER

v.

ELEANOR J. SMITH *et al.*

Filed at Ottawa May 15, 1885.

1. CHANCERY—*dismissal for want of equity—or for want of prosecution—which is proper.* A bill in chancery was filed April 21, 1880, on which a summons issued, which was returned not found, and on June 10, following, all the defendants except one answered. Replication was filed on June 28. No further steps were taken in the cause until December 3, 1880, when the following order was entered: "This cause being this day called for hearing, come the defendants, by their solicitors, and the complainant comes not, nor does any one for her, and on motion of defendants it is ordered that this cause be and is hereby dismissed at complainant's costs, for want of equity:" *Held*, that the dismissal for want of equity was erroneous. The proper order would have been a dismissal for want of prosecution.

2. SAME—*practice—where a case is improperly placed on trial docket.* If a chancery cause is through inadvertence set upon the trial docket before it is ready for hearing, it is the duty of the complainant to have the order placing the case on such docket, set aside; and if he does not, he can not complain that the cause is dismissed for want of prosecution when reached, in his absence, on the call of the docket.

3. PRACTICE—*how far parties chargeable with notice of all steps in a cause.* Parties are bound, at their peril, to take notice of all orders regularly made in the progress of a cause. So if the cause is placed upon the trial docket, it is the duty of the parties to be present when it is reached on the call for final disposition; and if they are not, in the absence of a reasonable excuse, they must suffer the consequences.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. MCCOY, POPE & MCCOY, for the plaintiff in error:

To render a final decree on the merits without any hearing or submission at all, is clearly error. *Blair* v. *Reading*, 99 Ill. 610.

All that could have been legally done was to dismiss the bill for want of prosecution, and without prejudice. *Kempton* v. *Burgess*, 136 Mass. 192; *McKinney* v. *McKinney*, 36 Mich. 37.

The record shows that the case was not ripe for a hearing. Charles J. Smith, a necessary defendant, was not served with process, and had not entered his appearance. The court had no jurisdiction so far as he was concerned.

The entry that the defendants came by their solicitors, does not enter the appearance. Those words will refer to the defendants in court, only. *Gardner* v. *Hall*, 29 Ill. 277; *Klemm* v. *Dewes*, 28 id. 317.

Where persons who are necessary parties refuse to appear, and the court has no power to reach them by process, the bill must be dismissed without prejudice. *Town of Virden* v. *Needles*, 98 Ill. 370; *Piquet* v. *Swan*, 5 Mason's C. C. 561; *Chiles* v. *Allen's Heirs*, 2 Marsh. 351; *Key* v. *Hord*, 4 Munf. 485; *Schwab* v. *Mabley*, 47 Mich. 512; *Frink* v. *Bentley*, id. 512; *Thompson* v. *Clay*, 1 J. J. Marsh. 413.

The proper course would have been to enter a rule *nisi* that unless in a given time the proper parties were made, the suit as to those parties should be dismissed. *Thompson* v. *Clay*, 1 J. J. Marsh. 413; *Chiles* v. *Allen's Heirs*, 2 id. 351.

Plaintiff in error is entitled to costs. Rev. Stat. chap. 33, sec. 22.

Messrs. H. S. & F. S. OSBORN, for the defendants in error:

The bill was properly dismissed for the *laches* of the complainant in not preparing the case for an early hearing. The bill was a cloud on the defendants' title.

It is true the decree, as entered, can not well be sustained on this record. We ask to have the proper decree entered now, by this court,—that is, a dismissal without prejudice. *Kempton* v. *Burgess*, 136 Mass. 192.

If a cause is remanded without specific instructions, it is suggested that the rights of intervening innocent purchasers should be protected in any decree rendered by this court. *McJilton* v. *Love*, 13 Ill. 494; *McLagan* v. *Brown*, 11 id. 519; *Goudy* v. *Hall*, 36 id. 319; *Feaston* v. *Fleming*, 56 id. 457;

Wadhams v. *Gay*, 73 id. 415. And that the costs in this court should be taxed against the plaintiff in error, or abide the final result of the cause. *McKinney* v. *McKinney*, 36 Mich. 37; *Schwab* v. *Mabley*, 47 id. 512; *Frink* v. *Bentley*, id. 515; *Kempton* v. *Burgess*, 136 Mass. 192.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Mary Cleaver, plaintiff in error, on the 21st of April, 1880, filed a bill in the Superior Court of Cook county, against the heirs at law and personal representatives of William Sidney Smith, late of Suffolk county, New York, seeking to recover certain real estate in the city of Chicago. In the view taken of the case it is not necessary to discuss the particulars of the controversy. A summons was issued against the defendants on the same day the bill was filed, which was subsequently returned "not found." There were ten of the heirs, all of whom, except Charles F. Smith, on the 10th of June, 1880, filed a joint and several answer, denying the equities of the bill, and showing that the said Charles F. had disposed of his interest in the property before the filing of the bill. On the 28th of the same month, a general replication was filed to the answer.

The record fails to show that any steps after the issuing of the original summons were ever taken by complainant to procure service on the said Charles F. Indeed, no steps of any kind seem to have been taken in the case after the filing of the replication, until the third day of December, 1880, being a period of some five months, when the following final order was entered in the cause: "This cause being this day called for hearing, come the defendants, by their solicitors, and the complainant comes not, nor does any one for her, and on motion of defendants it is ordered that this cause be and is hereby dismissed at complainant's costs, for want of equity."

It is clear the decree as rendered can not be sustained. Indeed, this is conceded by solicitors for defendants in error. On the other hand, it is equally clear that in view of the apparent *laches* of plaintiff in error, wholly unexplained, the court, when the cause was reached upon the call of the docket, would have been fully warranted in dismissing the bill for want of prosecution. We must assume the case had been placed upon the trial docket, otherwise it would not have been called for a hearing, and if it had, through inadvertence or otherwise, been improperly placed there, it was the duty of plaintiff in error to have had the order placing it on the trial docket set aside, if the cause was not ready for a hearing. Parties are bound, at their peril, to take notice of all orders regularly made in the progress of a cause. When, therefore, a cause is regularly placed upon the trial docket, it is the duty of the parties to be present when the cause is reached on the call for final disposition, and if they are not, in the absence of a reasonable excuse, they must suffer the consequences. So far as the merits of the controversy are indicated by the documentary proofs and exhibits in the cause, we see nothing favorable to complainant, and from this fact, taken in connection with the unexplained *laches* on her part, we are of opinion the ends of justice will be best subserved by entering the proper decree in this court.

As the decree of the court below is erroneous in dismissing the bill "for want of equity," instead of "for want of prosecution," as it should do, it is for that reason reversed, and the defendants in error are taxed with the costs in this court, and the plaintiff in error with all costs in the court below, and a decree will be entered here dismissing the bill without prejudice.

Decree reversed.

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WILLIAM GORDON *et al.*

v.

FRANK P. REYNOLDS.

Filed at Ottawa May 15, 1885.

1. FRAUDULENT CONVEYANCE—*sale on secret trust for benefit of the grantor—to hinder and delay creditors.* A person being in debt, conveyed his real and personal property to his son, under an agreement made for the purpose, on the part of both, to defeat, hinder and delay a creditor in the collection of his debt, no consideration being paid therefor, and with a secret understanding the son should hold the property for the use and benefit of the father, and reconvey it to him when requested, and if the father did not require a reconveyance, the son to take care of him and provide him with necessaries during his life, and have the property at his death. It was *held*, the sale and conveyance were fraudulent and void as to creditors of the father.

2. Even where the grantee pays a valuable consideration, if a part of the consideration is an undertaking and promise by the grantee to support and take care of the grantor, such an agreement renders the transfer void as to then existing creditors of the grantor.

3. SAME—*distinction as to rights of prior and subsequent creditors.* If the fraudulent grantor reserves no future use or benefit in the property, then the transfer can be attacked only by pre-existing creditors; but where the conveyance is merely colorable, and a secret trust exists for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors.

4. SAME—*inadequacy of consideration.* The sale and transfer by a father to his son, of real estate of the cash value of $2500, and personal property of the value of $250, for the price of $500 paid, will be fraudulent as to existing creditors of the father, on account of the gross inadequacy of consideration.

5. WAIVER OF DEMURRER—*by pleading over.* A defendant, by answering a bill in chancery after the overruling of his demurrer thereto, waives his demurrer, except so far as he may have the same advantage on final hearing; and he can not assign for error the ruling upon the demurrer.

6. STATUTE OF FRAUDS—*should be specially pleaded.* The Statute of Frauds can not be relied on as a defence, in any case, unless insisted upon by plea or answer. Without it is thus interposed, a trust resting in parol will be enforced the same as if it was in writing.

7. AMENDMENT—*in chancery—how far matter of discretion.* The granting of leave to amend the pleadings in chancery cases rests in the discretion

of the court; and unless there is an abuse of discretion, the action of the court will not be the subject of review.

8. SAME—*amendment of bill—to avoid a variance—at what time.* An amendment of a bill in chancery is properly allowed on the hearing, in furtherance of justice, to avoid the effect of a variance from the proofs. It is not material when amendments are permitted to be made, except as to the terms the court may impose as a condition thereto.

9. SAME—*in case bill is unnecessarily sworn to.* Where a bill is not required by law to be verified by the oath of the complainant, the fact that it is unnecessarily so verified affords no ground for refusing leave to amend the same.

10. EVIDENCE—*on creditor's bill—acts of debtor.* On the hearing of a bill to subject property conveyed by a judgment debtor to his son, to the satisfaction of the judgment, there is no error in refusing evidence offered by the son to show acts of the debtor done in furtherance of the rights of the creditor, and to aid him in the suit.

11. SAME—*in chancery—receiving evidence subject to objections.* As a general rule, the better practice in chancery cases is to receive evidence subject to such objections as may be taken to it, to be considered on the final hearing, when the court will disregard it, if incompetent, or if competent, give it such weight as it may be entitled to. In such case it will be presumed that the court considered only competent and relevant evidence.

12. WITNESS—*competency—wife for her husband.* On bill to set aside a conveyance made by a judgment debtor as being fraudulent as to creditors, the wife of the grantee defendant is not a competent witness for him, to sustain the alleged *bona fides* of the conveyance.

13. SAME—*impeachment—by proof of inconsistent statements.* Declarations and statements of a witness inconsistent with his testimony, are not admissible in evidence to impeach him, unless where his testimony relates to matters material to the issues, nor then unless his attention has been called to the time, place and persons when, where and to whom he had made his supposed declarations.

14. SAME—*time for offering impeaching evidence—discretion.* Where plaintiff's witness is asked certain questions on cross-examination, for the purpose of laying a foundation to impeach him, and he is again called by the plaintiff in rebuttal, after the defendant has closed his testimony, and asked as to other matters merely in rebuttal, it is a matter of discretion with the court at that stage of the case to allow the defendant to introduce evidence to impeach the witness.

15. ERROR *is obviated by evidence rejected being afterward received.* Error can not be predicated on the refusal to allow a question to be answered by a witness when the witness afterward testifies to the same fact sought to be established by the question.

APPEAL from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. E. A. SHERBURNE, for the appellants.

Mr. ELBRIDGE HANECY, for the appellee.

Mr. JUSTICE TUNNICLIFF delivered the opinion of the Court:

On the 3d of March, 1883, appellee exhibited his bill of complaint in the Superior Court of Cook county, against appellants and one Charles Gordon, alleging, in substance, that on that day he had recovered a judgment in said court against said Charles Gordon, for $2103, and costs; that an execution had been issued, and returned no property found; that on the 16th of August, 1876, said Charles Gordon was the owner in fee of lot 12, in Waller's subdivision of block 20, in Bickerdike's addition to Chicago, and also of a large amount of goods and chattels in the buildings on said real estate, and that on said day he pretended to assign and transfer said real and personal property to his son, William Gordon, for the nominal consideration of $500, but that said deed was never delivered and never became operative; that said William never paid said $500, or any part of it, and that said real estate and property were held by said William in trust, for the benefit and use of said Charles; that the consideration of said pretended conveyance was, that said Charles was to have a home on said premises, and was to receive from said property his future support and maintenance during his life; that said William and his wife soon after moved into the house on said premises, and still continue in the possession thereof; that he has never paid anything on account of said pretended conveyance, and that said premises are now held by him in trust for said Charles, and are liable for his debts; that said pretended conveyance was made to secure to said Charles a secret trust therein, and to hinder, delay and defraud his

creditors, and to prevent said property being sold on execution against said Charles Gordon; that $150 of the indebtedness for which the note was given, upon which said judgment was recovered, was due and owing from said Charles Gordon to Margaret McGhie, for money loaned by her to him in December, 1874, and the balance of $1850 was obtained by him of her between the year 1877 and the date of the note, which was January 15, 1883, and that the note was indorsed and delivered by said Margaret McGhie to appellee, before its maturity. There are other allegations made, and discovery sought, such as are usually inserted in a creditor's bill proper; but defendants' oath being waived, and this not being technically a creditor's bill, they need not be further noticed. Prayer that said pretended conveyance be set aside, and said real and personal estate subjected to the payment of said judgment, and for such other relief as the nature of the case may require. The bill was sworn to. A demurrer was filed by William and Mary Gordon, which was overruled, and on April 30, 1883, they filed their answer, alleging that William Gordon purchased the property of his father, Charles Gordon, and paid him therefor $997.67, and denied the other averments in the bill, substantially, and claimed that appellee is only nominally the complainant, and that Charles Gordon is the real complainant, and that they are conspiring to deprive William and Mary Gordon of the property. On the 1st of December, A. D. 1883, appellee filed a supplemental bill, stating that on the 16th of August, 1876, Charles Gordon was indebted to one Elizabeth Martin, in about $200, for which, on the 19th of December, 1876, she brought suit before a justice, recovered judgment, filed a transcript thereof in the circuit court, and caused execution to issue, and the lot in controversy levied upon and sold, and bid in by her, and not being redeemed from, she obtained a deed, and since the filing of the original bill,—to-wit, November 23, 1883,—has conveyed the premises to appellee; that long prior to

August 16, 1876, Charles Gordon was the owner in fee of the premises, the same not being a homestead, and that on that day Charles conveyed the same to William for a pretended consideration of $500, which was never paid; that the same was made fraudulently, to hinder and delay creditors; that the property was worth $2500; that William has collected $1800 in rents from the premises, and that the consideration pretended to have been paid was grossly inadequate, and if William ever paid anything, he has been more than repaid in rents. Prayer that the conveyance to William be declared fraudulent and void, and appellee be decreed the owner, and for general relief. A demurrer to this supplemental bill having been overruled, the appellants, William and Mary Gordon, filed their answer, denying the indebtedness from Charles Gordon to Martin, and alleging that there was a conspiracy between them and appellee to deprive appellants of the premises; that Martin and Charles Gordon had each filed a bill to set aside the deed from Charles to William, both of which had been dismissed,—one after a demurrer had been sustained to it, and the other for want of prosecution. William and Mary also filed a cross-bill setting up the same facts, and that they have made valuable improvements, and expended large sums for taxes and repairs, but ask no relief on that account. They pray that the judgment, transcript and sheriff's deed be canceled and set aside. An answer and replication were filed, and on a hearing a decree was rendered, declaring the transfer from Charles Gordon to William Gordon, both as to the lot and the personal estate, void and of no effect as to appellee, and dismissing appellants' cross-bill for want of equity.

The appellants have arranged the errors complained of, under five heads, in their brief: First, in overruling demurrer to the original bill; second, in overruling demurrer to the supplemental bill; third, in allowing appellee (complainant below) to state, as they say, one case in his pleadings and to

present a different one in his evidence; fourth, in excluding proper evidence offered in behalf of appellants; and fifth, in not dismissing the bill for want of equity.

The appellants not standing by their demurrers, but answering over, must be considered as having waived them, except so far as he may have the same advantage, in substance, on the final hearing, in case complainant (upon his whole case, pleadings and proof considered,) is not entitled to the relief sought.

Under the third objection it is insisted the court erred in allowing appellee to amend his original bill after the evidence was substantially all heard, so that the allegations and proof might correspond. This was not only not error, but is a practice highly commendable, and absolutely necessary in a great many cases to a proper administration of justice. We fully recognize the rule contended for by counsel for appellants, that a complainant can not make one case by his pleadings and another by his evidence, and succeed. To obviate this he should do as was done in this case,—obtain leave to and amend his pleadings so as to fit the case shown by the evidence. It is not material when such amendments are made, except as to the terms the court, in its discretion, might see proper to impose as a condition to permitting the amendment. Usually these amendments are made after the evidence is all in, and the variance is brought out in the course of the argument, and it sometimes occurs that several amendments of this nature and for this purpose are made at different times during the final argument of the case. These amendments are purely discretionary, and ordinarily, in the absence of evidence showing an abuse of a reasonable discretion, are not subject to review. Rev. Stat. chap. 22, sec. 37; *Jefferson County* v. *Ferguson*, 13 Ill. 33; *Hewitt* v. *Dement*, 57 id. 500; *Booth* v. *Wiley et al.* 102 id. 84.

The court properly excluded the proffered proof by the sheriff, that Charles Gordon was "so anxious" to have a de-

mand made upon him for property to satisfy the execution that he went to the sheriff's office to enable the sheriff to make it. He could not, by his acts or in any other way, do anything to prejudice the rights of his creditor, and we do not see, even if Charles Gordon was anxious to have appellee make his judgment out of this property, that it showed any conspiracy to do so wrongfully.

It is said the court erred in refusing to allow Mary Gordon, the wife of William, to answer this question: "Do you know whether your husband (appellant William,) paid him (Charles) anything for the property?" Whether this ruling of the court was correct or not can not avail appellants, as they obtained the benefit of the testimony of Mary concerning that matter on her re-direct examination, in which she says: "I know that my husband paid Charles Gordon money for the place, because I know he had it to pay, and paid it; and after he paid it I had a conversation with Charles about his having received it, and he said he had received $220 from William when he bought the place." We do not see how Mary Gordon, the wife of William, could be a competent witness in his behalf in this case.

For the purpose of impeaching Charles Gordon, who had testified that he owed his daughter, Mrs. McGhie, $150 in 1874, he was asked by appellants' counsel if he did not go to her house in 1876 and claim of her that she owed him $100, and if a difficulty did not thereupon ensue between him and Mrs. McGhie and another daughter, (Susan Gordon,) and he go before a justice and swear out a warrant for their arrest, charging them with an assault with a deadly weapon,—which he denied, and appellants introduced several witnesses, whilst offering the testimony on their behalf, to contradict said Charles Gordon, and to show that he had stated, after his return from Mrs. McGhie, that she had assaulted him and turned him out of doors, and said, "that is what I get for my $100." After the appellants had introduced all their evidence, and

closed the case on their part, and appellee was offering his evidence in rebuttal, and for that purpose had recalled and examined said Charles Gordon about other matters not relating in any way to his visit to Mrs. McGhie, or with his complaint against her, or her arrest, the counsel for appellants, after cross-examining about other matters, showed him the complaint, for the purpose of identifying his signature to it, which he did, and he, after reading the complaint, said that it was not correct, and counsel then offered in evidence the warrant issued by the justice for the arrest of Susan Gordon and Margaret McGhie, on the charge contained in the complaint, with the return of the officer showing their arrest,—whereupon the court refused to allow the record to be introduced at that stage of the case, and said it should have been offered before, and in thus ruling appellants insist there was error. As a general rule we think the better practice in chancery cases is to admit evidence, subject to such objections as may be taken to it, till the final hearing, when the court will disregard it, if incompetent, or if not, give such weight to it as it may be entitled to; and it is not necessary for the court, in its decree, to pass upon these questions, the presumption being that it considered all competent and relevant testimony, and none other. As to this particular evidence, it having been offered by appellants after they had closed their case, it was discretionary with the court whether it would receive it or not, and its decision in that respect can not be reviewed. But even if it was wrongfully excluded, it is not of that vital character which would necessitate a reversal of the case on that account.

The last objection of appellants, that the court erred in not dismissing the case for want of equity, brings the whole case before us for consideration.

It will be observed from the pleadings in the case, that appellants, neither in their answer nor cross-bill, have alleged that the premises in controversy, either when conveyed to

William, or at the time of the rendition of the judgments, or at any time, were the homestead of Charles Gordon, the vendor and judgment debtor; nor do they set up and claim the protection of any statute of limitations, or allege such a state of facts, if they existed, (and we do not intend to intimate that they did exist,) as would authorize the successful pleading of that statute; nor do they ask for any account or allowance for improvements claimed to have been made, or for taxes paid; neither do they invoke the benefit of that section of our Statute of Frauds and Perjuries which provides that "all declarations or creations of trust or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will, in writing, or else they shall be utterly void and of no effect." It is too familiar law to require any citation of authorities, that this last statute can not be relied upon as a defence in any case, unless insisted upon by plea or answer. Without it is thus interposed, a trust resting in parol will be enforced the same as though it was in writing. Had William Gordon, when he received this deed, executed and given to his father a writing declaring that the conveyance of the lot to him was made and was to be held by him in trust for the use and benefit of his father, no one would question that the father, Charles Gordon, would have such an interest in the lot that it could be sold on execution against him, whether the debt upon which the judgment had been obtained had been contracted prior or subsequent to the conveyance. The statute not being set up as a defence, the lot would be, under the parol agreement, just as much subject to the grantor's debts, antecedent or subsequent, as though the agreement had been reduced to writing. But even if the statute had been insisted upon, the result would not have been different in this case, for the evidence, we think, establishes that a part of Mrs. McGhie's debt, as well as all of that of Mrs. Martin, was contracted prior to the conveyance in con-

troversy, and that the latter was made, by agreement between Charles Gordon and his son, William, with the purpose and intent, on the part of both, to defeat and hinder and delay Martin in the collection of her debt; that no consideration was paid for the pretended sale of the real or personal estate, and that there was a secret understanding between Charles and William Gordon that the latter should hold it for the use and benefit of the former, and reconvey it to him when requested, and if Charles did not require him to reconvey it he (William) should take care of him (Charles) and provide him with necessaries during his natural life, and have the property at his death. That such a sale is void both as to real and personal property, is well settled. (*Lukins* v. *Aird*, 6 Wall. 78; *Moore* v. *Wood*, 100 Ill. 451.) Even where the grantee pays a valuable consideration, yet if a part of the consideration is an undertaking and promise by the grantee to support and take care of the grantor, such an agreement renders the transfer void as to existing creditors of the grantor. This point was fully considered, and so held by this court, in *Moore* v. *Wood*, *supra*.

The distinction as to the rights of precedent and subsequent creditors seems to be this: if the grantor reserves no future use or benefit in the property, then the sale can be attacked only by a preëxisting creditor; but where the conveyance is merely colorable, and a secret trust and confidence exist for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors. *Jones et al.* v. *King et al.* 86 Ill. 225.

It can serve no useful purpose to discuss the evidence in this case, at large. Very much of it is incompetent, and consists largely of declarations of Charles Gordon, after the conveyance, about immaterial matters, and none of which were admissible in evidence against appellee, except for the purpose of impeaching Gordon as his witness, and for that purpose only where his testimony related to matters material to the

issue, and not then unless his attention had been called to the time, place, and persons to whom he had made his supposed declarations, which in most instances was omitted to be done.

Charles Gordon testified that he was sixty-nine years of age, and a widower; that he had a difference with his late housekeeper about her wages, and about a claim she was making against him for money she claimed to have expended for him whilst he was sick; that he considered the claim exorbitant, and wished to avoid its payment; that he consulted his son, the appellant William, about it, and that the latter told him, "You make over this property to me, and when it is all settled you can take it back," and that he then said to William, "Well, if you choose to take care of me, and provide me with all the necessaries during my life, at my *death* you can have the property,—by so doing you can go in and live there now. He agreed to do so. Afterward we went to an attorney, and talked the thing over to him, and he (the attorney) wished to make the deed in consideration of $1000. I objected, and told him there was no money in the transaction,—that I did not want that. The attorney said, 'I can not make it legal without putting something in it,' so the lawyer says, 'We will put $500 in it.' I allowed it, and the attorney made out the deed. * * * The property was unincumbered. The house was full of personal property,—furniture, carpets, book-cases, books, and everything connected with the house. The building and lot were worth about $2500, and the personal property about $250, in 1876. I had previously made a written acknowledgment of my indebtedness to Mrs. Martin. I owed Mrs. McGhie $150 at that time. I had no other property." William soon after moved into the house, and claimed both the lot and personal property under this pretended purchase, and the evidence tends strongly to show that a few months afterward he committed a serious assault upon his father, and drove him from the place. The old man (Charles) swears his

son never paid him anything for the property, and that he was not owing William anything at the time. Declarations made by William, on several occasions, are proven, tending to corroborate old Mr. Gordon's story, and inconsistent with the idea that William was a *bona fide* purchaser of the property for a valuable consideration; but we need not notice them particularly, as we think the testimony of William, himself, as to how, and the amount, he claims to have paid for the property, stamps the transaction as fraudulent as to existing creditors. Let it be borne in mind that there is no evidence tending to show that the real estate, and very little that the personal estate, was worth any less than the value ($2500 as to the lot, and $250 as to the personal property,) put upon it by Charles Gordon, in his testimony. The fact that he did not remember exactly what he paid for the lot, and believed it was $600, but had put improvements upon it since, amounts to nothing without proof as to the time of purchase, whether it had risen in value since, and the value of the improvements placed upon it. Had it been worth no more than about the sum appellant William claims to have been paid for it, we have no doubt he could and would have found plenty of witnesses in Chicago acquainted with the value of this property, to have proved it.

In their answer appellants claim the sum of $997.67 to have been paid in cash for the property. This shows, if true, that for a sale between father and son, they were particular as to the exact amount, else the son might perhaps have been induced to pay $2.33 more, so as to have made it an even $1000. They were evidently not so careful to ascertain the exact value of the personal property, for they seem to have made no inventory of that, or made even an estimate as to its worth, for the father puts it at $250, and the son at $60. But if the amount paid was $997.67, it was but a trifle over one-third its actual value. When, however, we turn to the testimony of William, we find he there claims to have paid only

$500, or less than one-fifth its value. He says: "I paid Charles Gordon $500 cash for the conveyance of the property in controversy to me,—$190 of it was money I loaned him in 1865, $90 was money I let him have in 1870, and when I bought the place I paid him $220 more." It will be observed that this $190 had been standing eight years prior to the conveyance, and, *prima facie*, was barred by the Statute of Limitations. But aside from that, even if we admit that the son bought the property and paid the $500 for it, as he claims, the consideration is so flagrantly inadequate that such a transaction between father and son will, as to existing creditors, be declared fraudulent, without other proof. But this payment is not only denied by Charles Gordon, absolutely, but there is considerable other evidence in the case tending to show that William could not have had the money, either at the time the deed was made, or in 1865 or 1870, when he claims to have loaned him the $190 and the $90. The peculiar and unusual circumstances under which he claims to have paid this $220, look, to say the least, very suspicious. Instead of waiting until the deed was made out by the notary, and then paying it, he says he had a previous arrangement with his father to meet him in the back room of a saloon in Chicago, and pay him there. He says: "I gave him $220 the day the deed was made out, in the rear room of a saloon run by a man of the name of Slater, on Randolph street. * * * We went in there to talk the matter over before we went to the notary's office. He came there by agreement to meet me that morning at a certain time. He came to my house the night before, and agreed to meet me at this place, and from there went to the notary's office. I paid him the $220 then, in the saloon, in bills. I got the money from my house." Why not have waited till the deed was made out before making the payment? But if it was to be paid before, why not have paid it at his own house, when his father was there, the evening before? It is most strange that they should have made an agreement

to meet in the back room of this saloon to pay the money over, instead of at the notary's office, where they both knew they had to go to have the deed made out. Charles Gordon not only denies all this, but denies ever having been in the saloon. As a further indication that it was not a purchase by William, but a mere contrivance to get the title in his name without any real bargain or consideration being paid, William says, in his testimony: "I had a talk with father of what the consideration of the conveyance by him to me was. He stated it was $500. He counted up these payments, moneys I had loaned him at different times, and before we went to the notary's office, and he told me it was $500."

It is claimed that the original bill ought not to be maintained, because, as appellants claim, Charles Gordon did not owe Mrs. McGhie the $150, part of the alleged consideration of the $2000 note, prior to the conveyance being made. Both Mrs. McGhie and Charles Gordon swear he did owe it to her before that time, and we can not say that appellants have so discredited them that we should disbelieve their testimony; besides, as we have attempted to show, in the attitude this case presents it is not material whether the indebtedness for which the note was given was contracted before or after the conveyance.

Appellants' counsel complains that the court should have found that the balance of the consideration of the $2000 note was for board, clothing, medicine, and small sums of money loaned to Charles Gordon by Mrs. McGhie, and claims there is no evidence to sustain that finding. In this he is in error, arising from an omission, we presume by the person who made the abstract of complainant's evidence, for we find, on examination of the record, that Mrs. McGhie says that the balance of the indebtedness included in this note "was for board, clothes and medicine, and for cash advanced from 1877 down to the date of this note."

There is no force in the objection that appellee did not pay Mrs. McGhie the face value of the note. Had she given it to him, it could not affect his rights to pursue the same remedies for its collection that she could have done. We see nothing in the evidence reflecting upon his private or professional character in this transaction.

The fact that appellee's bill was sworn to, is urged as a reason why the court erred in allowing it to be amended. Swearing to the bill in this case was wholly unnecessary. It was not a bill for an injunction, in which proceeding it is sworn to that it may be used not only as a bill, but also as an affidavit in procuring, as well as on motion to dissolve, the injunction. Not being required in this case, it was to be disregarded for any purpose.

It is, perhaps, proper to say that none of our limitation laws could have been successfully invoked in this case, even if set up by plea or answer, from the fact that the shortest time (seven years) creating a limitation for the protection of parties in possession of real estate had not elapsed between the time of the making of the deed to William Gordon and the commencement of this suit to set it aside; and, besides, there was wanting an essential element necessary to make that statute available, to-wit, good faith in the making of the deed.

Charles Gordon swears the deed was never delivered by him to William Gordon; but as that is not material in the view we take of the case, we have treated it as having been delivered. We reach the conclusion, therefore, that appellee is entitled to have the conveyance from Charles Gordon to William Gordon of the real and personal property set aside, by reason of the matters alleged in the original bill, as amended, and which the evidence sustains; and as the relief sought by the supplemental bill is the same, it is unnecessary to discuss the question raised as to the right to file it, or the equities presented by it. The deed to William Gordon being set aside,

the cross-bill of appellants, based upon their supposed interest in the premises arising from such conveyance, can not be maintained.

The decree of the court below must be affirmed.

Decree affirmed.

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ALVIN KIDDER

v.

G. A. VANDERSLOOT.

Filed at Ottawa May 15, 1885.

1. ALLEGATIONS AND PROOFS—*in chancery.* The rule in equity is, that the proofs must correspond with the allegations of the bill, and be responsive thereto. But a variance not substantial will not be fatal.

2. So where a party, to secure a loan of $2500, conveyed to the lender eighty acres of land as a security, taking back a written agreement for a reconveyance on payment of the principal, and $270 for each year of the credit given, but it was alleged in the bill to foreclose that the mortgagor was to pay $250 a year as rent for the land, and the taxes thereon, and it appeared that $20 of the yearly payment was for the payment of the taxes, and $250 for interest, it was *held*, that there was no substantial variance.

3. PAROL EVIDENCE—*to change terms of written agreement.* The general rule that parol evidence is not admissible to change the terms of a written contract, has its exceptions, as, in respect to the consideration expressed in notes and conveyances. Such evidence is also admissible where usury is pleaded, regardless of the form the transaction may have in the writings executed by the parties.

4. USURY—*agreement to pay taxes on land mortgaged, in addition to interest.* A person borrowed $2500 on several years' time, and to secure its payment, with interest, conveyed to the lender eighty acres of land, taking back a written contract for a reconveyance on payment of the principal and ten per cent interest annually, that rate being the highest then allowed by law to be contracted for, with $20 yearly for taxes on the land, making $270 annually, and the proof showed that only $250 was in fact paid as interest, and that on payment of that sum, and producing a receipt for the taxes of such year, he was credited with $270. It was *held*, the transaction was not usurious, and that the $20 was but a guaranty for the payment of the taxes, which were chargeable against the mortgagee by reason of the legal title being in him.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. JACK & MOORE, for the appellant:

Parol evidence was not admissible to explain the contract, and show that the interest was in fact but $250 per year, and the other $20 as a security for the payment of the taxes. This court has often held that an absolute, written promise can not be shown by parol to be contingent. *Fay* v. *Blackstone*, 31 Ill. 538; *Walker* v. *Crawford*, 56 id. 444; *Andrews* v. *Mann*, 92 id. 40.

A contract can not rest partly in writing and partly in parol. *Fire Ins. Co.* v. *Webster*, 69 Ill. 392; *Snyder* v. *Griswold*, 37 id. 216.

The result is, that the borrower had agreed to pay $270 per annum for the use of $2500 loaned to him for five years, which was about eleven per cent per annum. Thus it will be seen the transaction was usurious.

Messrs. WINTER & PRINCE, for the appellee:

In determining the question of usury, the intention of the parties should govern, without regard to the form of the contract. *Cooper* v. *Nook*, 27 Ill. 301.

The instrument was offered in defence by appellant, and relied upon as proof of usury, in connection with the receipts. We explained, as we had the right to do, the real consideration of the contract, and the actual amount of money received under it. We prayed for general and specific relief. The scope of our bill warranted, under the general and specific prayer for relief, the decree found by the court. *Curyea* v. *Berry*, 84 Ill. 600; *Stanley* v. *Valentine*, 79 id. 544.

Parol evidence is always admissible to show what was the real consideration of a written instrument. *Morris* v. *Tillson*, 81 Ill. 607; *Huebsch* v. *Scheel*, id. 281; *Wolf* v. *Fletemeyer*, 83 id. 418; *Primm* v. *Legg*, 67 id. 500.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

On the 6th day of March, 1874, George Kidder borrowed of G. A. Vandersloot $2500. To secure the payment of the money, Kidder conveyed to Vandersloot a certain tract of land, consisting of eighty acres, in Knox county. At the same time Vandersloot gave Kidder a contract, in writing, by the terms of which he agreed to convey the land to Kidder providing the latter paid $2500 March 6, 1879, $270 March 6, 1875, and the same amount on March 6, 1876, 1877, 1878 and 1879. Vandersloot treated the deed and the contract as a mortgage, and Kidder, the mortgagor, having died, this bill was brought, against the heirs of Kidder, to foreclose the mortgage. In the answer, the defendants set up as a defence, usury, and payment. But the court, on the hearing, upon the pleadings and evidence, rendered a decree for the amount claimed in the bill. Alvin Kidder, one of the defendants, appealed.

In the bill the complainant alleged the execution and delivery of the deed from Kidder to himself, and averred that the deed was a mortgage; that a contract was executed at the same time, and as a part of the same transaction, by which Kidder, the mortgagor, agreed to pay $250 annually, as rent. When the contract was produced on the trial of the cause, it provided for the payment of $270, and not $250, as alleged, and it is contended that there was a fatal variance between the bill and the evidence. The practice in causes in equity is well settled that the proofs must be responsive to the allegations in the bill. But while we fully recognize and adhere to the general rule, we do not regard the variance here, as to the amount, a material one. (See *Breckenridge* v. *Ostrom*, 79 Ill. 71.) Besides, the allegation was not merely that $250 was to be paid, but it was that $250 was to be paid and also that Kidder further agreed to pay the taxes on the land. Now, while the written contract, on its face, shows that $270 was to be paid annually, it turns out, from the evidence, that $20 of

this amount was to cover the taxes on the land, and the balance ($250) was to be paid as interest for the money loaned. The substance of the transaction was, as alleged in the bill, that Kidder was to pay $250 annually, and the taxes, and when due consideration is given to all the evidence bearing on the question, we can not say that there was a substantial variance between the allegations and proofs.

It is also urged that the court erred in admitting parol evidence to change or vary the terms of the written contract, which provided for the annual payment of $270. The general rule is, as claimed, that parol evidence is not admissible to change the terms of a written contract. But this rule has its exceptions. A promissory note, which is a written contract, may upon its face show a valid consideration for the promise to pay money, and yet parol evidence is admissible to show a want of consideration. Parol evidence may be admitted to prove the consideration of a deed different from that expressed in the instrument. Other examples might be given where the general rule may be varied, but it is unnecessary. Here usury was pleaded, and parol evidence has always been allowed in such cases, regardless of the form the transaction may assume in the writings executed by the parties.

It is also claimed that the court erred in not finding the transaction usurious. The amount loaned was $2500. At the time of the loan ten per cent, where the parties agreed upon that amount, was a legal rate of interest. The complainant had the right, therefore, to contract for and receive $250 interest, annually, on the loan.

But it is insisted that the agreement which complainant delivered to Kidder provided for the payment of $270 annually, and that this contract rendered the transaction usurious. It was not proven that more than $250 annually, was ever actually paid. On the other hand, the proof is positive that at the end of the second year only $250 was paid as the interest for that year, and as to the other two years in which

the interest was paid, the evidence preponderates in favor of that amount, and no more, having been paid. George H. Littlewood was present when the contract was made between complainant and Kidder for the loan, and drew the papers for the parties. He testified that the money was loaned at ten per cent, and that was all that was to be paid as interest,—that the $20 was added for the taxes on the land each year. The land had been conveyed to complainant, and he held the legal title, and would be liable, of course, for the taxes, unless Kidder saw proper to pay them. In order to guard against loss on this account the taxes on the land were estimated at $20 each year, and this amount Kidder agreed to pay. The agreement was merely this: Kidder agreed to pay ten per cent interest on the money loaned,—amounting to $250,—and also agreed to pay the taxes annually assessed on the land. Suppose, in lieu of giving a deed and taking a contract for a reconveyance, Kidder had given a note, and mortgage on the land to secure it, and in the note and mortgage agreed to pay $250 annually, as interest, and also all taxes on the land, estimated at $20, such a contract would not be regarded usurious,—and there is no difference in principle between the case supposed and the facts presented by this record. The $20 was inserted in the contract as a guaranty that the taxes would be paid, and when Kidder produced satisfactory evidence that the taxes had been paid, and paid the $250 due as interest, the $270 was receipted on the contract. The fact that the interest to be paid each year was only $250, was proven by a number of witnesses who had talked with Kidder in his lifetime, and he admitted to them that he had borrowed from complainant $2500, and was paying that amount of interest, and that he owned the land, and had to pay the taxes each year, amounting to some $20.

We think the transaction free from usury, and the decision of the Appellate Court will be affirmed.

Decree affirmed.

Syllabus.

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C. P. DUTTON

v.

THE CITY OF AURORA *et al.*

Filed at Ottawa May 15, 1885.

1. WATER WORKS *in cities and villages—powers in respect to their construction, etc.—act of 1873, in its application to cities acting under special charters.* The act entitled "An act authorizing cities, incorporated towns and villages to construct and maintain water works," approved and in force April 15, 1873, applies to all cities, whether incorporated under special charters or under the general law, except in cities, towns or villages in which water works were at its passage managed and controlled by a board of public works.

2. The first section of that act, in giving cities, towns, etc., power to provide for a supply of water by the erection, construction and maintenance of a system of water works, leaves the municipal authorities unrestricted as to the character and cost or the means whereby the supply of water shall be provided, and authorizes them to borrow money to the extent needed to make the contemplated improvement, and to this extent operates as a repeal of all limitations in their charters on their power of contracting indebtedness and borrowing money on bonds to be issued by them.

3. IMPLIED MUNICIPAL POWERS—*in aid of express powers.* An express grant of power to a municipal corporation, or other person, to do a given thing, carries with it, by implication, authority to use the necessary means by which it can be done. So the power to borrow money for a proposed public improvement by an incorporated city, gives, as a necessary incident, the power to issue its bonds for the money.

4. MUNICIPAL INDEBTEDNESS—*limitations as to power of contracting.* A limitation in a special city charter as to the rate of taxation is binding only upon the municipal authorities, and not upon the General Assembly; but section 12, of article 9, of the constitution, which prohibits the incurring of corporate debts exceeding five per cent on the value of the taxable property of the municipality, is equally binding on the legislature.

5. REPEAL OF STATUTES—*by implication.* Where the provisions of a former and a later statute are inconsistent and repugnant in respect to the same subject matter, the later statute is a repeal of the former to the extent of the inconsistency or repugnancy.

6. So where a city, by its special charter, is limited in borrowing money to a sum not exceeding $5000 in any one year, for which it may issue its bonds, but a subsequent general law gives all incorporated cities, etc., power to construct water works, without limit as to the cost, and to borrow money for such purpose on its bonds, the general law will operate to repeal the pro-

visions in the charter only in respect to indebtedness and borrowing of money for constructing and maintaining a system of water works, leaving the limitations in the charter in force as to the contracting of indebtedness for other purposes.

7. CONSTRUCTION OF STATUTES—*the naming of particular things as excluding all others.* The introduction of an exception as to the operation of a general statute is necessarily exclusive of all other independent extrinsic exceptions.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. CHARLES KELLUM, Judge, presiding.

Mr. R. N. BOTSFORD, for the appellant:

The city, by its charter, is authorized to borrow money not exceeding $5000 in any one year. But it is claimed that the act of April 15, 1873, (Gen. Law, chap. 24, sec. 230,) enlarged the powers of the city. Corporate powers are strictly construed, and all doubts are resolved against them. 1 Dillon on Mun. Corp. sec. 55; *Mintern* v. *Larned*, 23 How. 435; *Schott* v. *People*, 89 Ill. 195; *Mix* v. *Ross*, 57 id. 121; *Pitzman* v. *Village of Freeburg*, 92 id. 111; *Zanone* v. *Mound City*, 103 id. 552; *Webster* v. *People*, 98 id. 343.

It can not be claimed that the limitation in the charter is repealed by implication. There is nothing in the general act indicating any intention to interfere with the provisions of special charters. *People* v. *Cooper*, 83 Ill. 595; *Edwards* v. *People*, 88 id. 340; *Town of Sparland* v. *Barnes*, 98 id. 595.

The policy of the legislature, since the new constitution, has been to change existing special charters only with the consent of the people affected thereby. *People* v. *Cooper*, 83 Ill. 590.

If the people want the power to make the proposed improvement, the remedy is by adopting the general Incorporation act. *Binkert* v. *Jansen*, 94 Ill. 283.

The power to create a municipal liability can not be deduced from considerations of inconvenience. *Hill* v. *Chicago*, 60 Ill. 91.

The presumption would be that the general law was intended to apply to such corporations, or cities organized under special charters, as were endowed by the provisions of such charters with the legal capacity to embrace and accept its benefits. *Pitzman* v. *Village of Freeburg*, 92 Ill. 111.

Mr. CHARLES WHEATON, and Mr. CHARLES L. ALLEN, for the appellees:

If it was the intention of the legislature, in passing the act of 1873, to enlarge appellees' powers to borrow money for constructing water works, then that intention is untrammeled. The restricting clause in the city charter restricts the city only, and so far as restricting the legislature's future acts is concerned, has no more effect than if it had never been passed. *United States* v. *New Orleans*, 98 U. S. 397.

No question of repeal is involved. A repealed law, except as to transactions passed and closed, must be considered as if it had never existed. *Canal Co.* v. *City of Chicago*, 14 Ill. 334.

Though the act of 1873 does enlarge the power of the city to borrow money for water works, yet for all other purposes the limiting clause in the charter is in force. If any force is given to the second section of the act, conferring power to borrow money, it must apply directly to cities under special charters, who do not have that power, and the court must construe this so as to give effect to all its parts. *Thompson* v. *Bulson*, 78 Ill. 277; *Davis* v. *Haydon*, 3 Scam. 35; *Perry County* v. *Jefferson County*, 94 Ill. 214.

To such cities, section 2 of the Water Works act is surplusage, and only when applied to cities under special charters does it become effective. Hurd's Stat. 1883, p. 238, secs. 169, 171.

Increase or restriction of the revenue power of a city organized under special charter can, since 1870, only be effected by a general law. *Spring* v. *Olney*, 78 Ill. 101; *People* v. *Cooper*, 83 id. 585.

Where express power to perform a public work is conferred on a city, all authorities are generally settled that reasonable power to carry on the same is implied. *Mills* v. *Gleason*, 11 Wis. 510; *Williamsport* v. *Commonwealth*, 84 Pa. St. 487; *United States* v. *New Orleans*, 98 U. S. 381. *A fortiori*, where express power to borrow money is given, it should be held to mean, to a reasonable amount, equal to the work to be done.

Legislation on the same subject matter by the same legislature shows an intent of the legislature to enlarge the city's power; and it is the duty and right of the court to seek the intention of an act, when not perfectly clear, in other acts on the same subject matter, or in affinity with it. *Stribling* v. *Prettyman*, 57 Ill. 371; 1 Blackstone's Com. *60, note.

The act of March 17, 1874, entitled "An act to provide for laying water supply-pipes, by bonds and special assessment, payable in installments," which refers to the same subject matter, and was passed by the same assembly that passed the act of April 15, 1873, provides for the issuance of bonds upon the estimated cost of laying water supply-pipes, not to exceed the statutory, charter or constitutional limitation of indebtedness of the city. When the legislature authorized the city of Aurora, in common with other cities and towns, to construct and maintain a system of water works, such authority, by implication, carried with it the power to adopt the ordinary means employed by such bodies to raise funds for that purpose. *United States* v. *New Orleans*, 98 U. S. 381; *Lowell* v. *Boston*, 111 Mass. 460; *Commonweath* v. *Commissioners of Alleghany Co.* 37 Pa. 277; *Hasbrouck* v. *Milwaukee*, 25 Wis. 122; *Hitchcock* v. *Galveston*, 96 U. S. 341; *Williamsport* v. *Commonwealth*, 84 Pa. St. 487; *Le Cauteuex* v. *Buffalo*, 33 N. Y. 333.

As to the powers of municipal corporations to borrow money and issue bonds to enable them to carry out the powers conferred upon them by the legislature, see Dillon on Mun. Corp.

(3d ed.) secs. 117, 127, 129; *Meyer* v. *Muscatine*, 1 Wall. 384; *Mitchell* v. *Bruling*, 4 id. 270; *Rogers* v. *Burlington*, 3 id. 654; *Commonwealth* v. *Pittsburg*, 84 Pa. St. 496.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill in equity, by a tax-payer of the city of Aurora, to enjoin the corporate authorities of that city from issuing its bonds to the amount of $100,000, for the purpose of erecting and maintaining a system of water works. The grounds upon which the injunction is prayed are, first, that the city is prohibited from borrowing money exceeding $5000 in any one year; and second, that the ordinance authorizing the issue of the bonds provides that an annual tax of three mills on the dollar shall be levied for the payment of principal and interest on the borrowed money, while section 1 of chapter 2 of an amendment to the original charter of the city of Aurora, approved February 16, 1861, provides, "the common council shall have the power to levy and collect taxes upon the real and personal property within the limits of said city, not exceeding one and one-half per cent upon the assessed value thereof, to pay the general contingent and other expenses of said city;" and if an additional tax of three mills on the dollar should be levied with the tax levy of 1883, it would have resulted in a levy of more than one and one-half per cent upon the assessed value of the real and personal property for that year. It was stipulated between the parties, on the hearing, that an additional tax of three mills on the dollar, in 1883, would have made a levy exceeding one and one-half per cent upon the assessed value of the real and personal property for that year. The court below, on final hearing, decreed that the bill be dismissed.

Subdivision 37, of section 4, of chapter 4, of the special charter under which the city of Aurora is incorporated, provides that the city authorities shall have power "to borrow

money, on the credit of the city, not exceeding $5000 in any one year, and pledge the revenues of the city for its payment, and issue bonds therefor." And if this is the only authority for issuing the bonds, it is very clear the ordinance is illegal, because in excess of any authority conferred upon the city council, and the court erred in dismissing the bill. This question turns upon whether an act entitled "An act authorizing cities, incorporated towns and villages to construct and maintain water works, approved and in force April 15, 1873," applies to cities incorporated under special charters, or only to cities incorporated under the general law. We think it applies to cities incorporated under special charters, as well as to those incorporated under the general law, for these reasons:

First—The language of the act is as broad and comprehensive in its terms as it is possible to make it. It is, that "*all cities*, incorporated towns and villages *in this State*, be and are hereby authorized," etc.

Second—If the act shall be held to apply only to cities, etc., incorporated under the general law, the second section is entirely superfluous, (which is never to be assumed,) since precisely the same powers are conferred upon those cities by section 1, article 10, of the general law in relation to "Cities, Villages and Towns." Rev. Stat. 1874, p. 240.

Third—The seventh section of the act is in these words: "The provisions of this act shall not apply to cities, towns or villages, in which water works are now managed or controlled by a board of public works." If it had been intended to limit it to cities incorporated under the general law, here would have been the proper place to state it. By this exception the act shall not apply to cities, etc., in which water works are now managed or controlled by a board of public works, necessarily, by the language employed, whether such cities are incorporated under special charters or under the general law, and, by implication, declaring that it does apply to all *other*

cities, whether incorporated under special charters or under the general law. "The introduction of the exemption is necessarily exclusive of all other independent, extrinsic exceptions." Potter's Dwarris on Statutes, 221.

Fourth—The title to the act indicates that it is a general law, "applicable to *all* cities," etc., in the State, and does not profess that it is an amendment or supplement to the general law.

The first section of this act empowers "all cities * * * in this State * * * to provide for a supply of water for the purposes of fire protection and for the use of the inhabitants of such cities, * * * by the erection, construction and maintaining of a system of water works." The second section provides that "such cities, incorporated towns and villages may borrow money and levy and collect a general tax, in the same manner as other municipal taxes may be levied and collected, for the erection, construction and maintaining of such water works, and appropriate money for the same." The language leaves the municipal authorities unrestricted as to the character and cost of the means whereby the supply of water shall be provided, and authorizes them to borrow money, etc., for that purpose,—*i. e.*, to the extent that it shall be necessary in order to make the contemplated improvement. The propositions are so fundamental and familiar that it is not deemed necessary to cite authorities to prove that where authority is given to do a thing, it carries with it, by implication, authority to use the necessary means by which it can be done; and that where the provisions of a former and a later statute are inconsistent and repugnant in respect of the same subject matter, the latter is a repeal of the former to the extent of the inconsistency or repugnancy. There was no necessity for a repealing clause in this general law, because provisions in special charters otherwise limiting the power to borrow money, levy taxes, etc., were not intended to be affected, but in all other instances of the contracting of

indebtedness it was intended they should remain in force, just as they then were. Having the power to contract the indebtedness, and to issue the bonds to an amount deemed necessary to produce the desired supply of water, the limitation in the special charter does not affect it. Having power to borrow money, the power to issue bonds therefor results as a necessary incident, and the circuit court properly refused to enjoin the issuing of the bonds.

The ordinance providing for the levying and collecting of an annual tax for the payment of these bonds is not shown to violate the restriction in section 12, of article 9, of the constitution, which prohibits the incurring of debts beyond five per centum on the value of the taxable property of the municipality, and in other respects it strictly conforms to the requirements of that section. The limitation in the special city charter as to the rate of taxation, is a limitation upon the municipal authority, and not upon the General Assembly, as is the constitutional limitation referred to; and so when the General Assembly authorized the incurring of a debt, to meet the annual interest upon which would require a greater levy than the amount specified in the special charter as the limit, the law authorizing the incurring of the debt is to be regarded as, to that extent, a repeal of the limitation in the special city charter. We regard, moreover, the act entitled "An act in relation to the levy and collection of taxes for sewerage and water works in cities of this State that may have established a system of sewerage and water works for such city, and to repeal an act therein named, and to authorize the cities, villages and incorporated towns of this State to levy and collect taxes to pay for water and light," approved and in force June 21, 1883, (Laws of 1883, page 68,) as conclusive as against any doubt that otherwise might have remained in this respect.

The judgment is affirmed.

Judgment affirmed.

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DAVID NORTON *et al.*

v.

TIMOTHY MOSHIER.

Filed at Ottawa May 15, 1885.

RES JUDICATA—*in the Supreme Court—reviewing the same matters on a second appeal.* Where this court passes upon the equities of a case, reverses the decree therein, and remands the cause with special directions, the parties can not, by the introduction of additional evidence or by filing a cross-bill, have this court review and reconsider its former judgment. That can be done only by petition for a rehearing, in the manner prescribed by the rules of this court.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Stark county; the Hon. N. M. LAWS, Judge, presiding.

Mr. H. BIGELOW, for the appellants.

Mr. MILES A. FULLER, for the appellee.

Per CURIAM: This case has been before this court now for the third time. (See *Moshier* v. *Norton*, 83 Ill. 519, and *Moshier* v. *Norton*, 100 id. 63.) The equities between the parties were passed upon when the case was first here, and the decree below reversed, and the cause remanded with directions to refer it to the master to state an account between the parties, in conformity with the decision of this court. The court below heard some additional evidence, and rendered a decree for complainant, based upon the new evidence, and without regarding as settled the questions we had passed upon, complainant again brought the case here, when it was once more fully considered, and the matters passed on before were fully reviewed, and the same conclusions reached, and the decree of the circuit court again reversed and the cause remanded. After this, the defendant Norton filed a cross-

bill, setting up the same equities presented by his answer to the original bill, and in effect asking to have the same again reviewed. Some additional testimony was taken, and the account again stated by the master, who found the amount due Moshier to be $9482.36, which report was approved by the court, and a decree rendered in his favor for that amount, and which decree was affirmed by the Appellate Court, and both parties have taken appeals in the case to this court.

We find no error in the case which would authorize a reversal, and we say again as we said when the case was last before us: "We regard it as simply an effort to induce this court to reconsider its former judgment. We have neither the power nor inclination to permit that to be done in this way. It could only be done on petition for rehearing, in the manner prescribed by the rules of this court."

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

DANIEL H. TOLMAN

v.

NATHANIEL H. JONES *et al.*

Filed at Ottawa May 15, 1885.

1. CONTEMPT—*refusal to obey order of court to deliver certain property into the hands of a receiver—effect of mere error in the order—or where a portion of the order is void—as to duty of person so directed.* Where a court of chancery has acquired jurisdiction over the property of an insolvent corporation, and of the defendant claiming the same, its order on the defendant to assign and turn over the property claimed by him, to a receiver, for its preservation, must be obeyed, however erroneous it may be; and the fact that such order may be too broad, and require the transfer of some of the property wrongfully, will not justify the defendant in refusing to obey.

2. An error in the exercise of the jurisdiction of the court in the ordering of one of the defendants to assign and deliver to the receiver some property not belonging to the corporation, will not render the order void as to such

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property, and justify the defendant in refusing to obey the same. In such case the tests of jurisdiction as to the subject matter are the allegations of the bill, and not the proof under it.

3. But even if the order of the court is void in part in requiring the surrender of property not derived from the corporation, the remedy of the defendant is to apply to the court for a modification of the order. If he fails to pursue this remedy, and refuses to obey the order, he may be committed for a contempt of court.

4. SAME—*rule to show cause—whether necessary, before commitment.* Where a party's refusal to make an assignment of property to a receiver in pursuance of an order of the court, is reported to the court, and he is present when the matter is considered, and makes no objection to the proceeding, and is fully heard, by himself and counsel, in the matter, and after being ordered by the court to execute the assignment refuses to do so, the court will be justified in making an order for his commitment for a contempt, without any rule on him to show cause to the contrary.

5. SAME—*appeal from order of commitment—what it involves.* On an appeal from an order of the court committing a defendant to the county jail for refusing to obey a prior order requiring him to assign and hand over certain property to a receiver, no error in such prior order can be considered. The only question as to such prior order that can be considered, is, whether the court had jurisdiction to make it. It matters not, so far as the question of condemnation is concerned, whether such order was made on sufficient proof or not.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

This cause comes before this court on an appeal from a judgment of affirmance by the Appellate Court for the First District, of an order of commitment made by the circuit court of Cook county for a contempt in refusing to assign to a receiver certain property in controversy in a suit.

On April 9, 1884, Nathaniel H. Jones and Henry L. Ware brought their bill in chancery, in the circuit court of Cook county, against Albert E. Dike, Henry J. Dike, L. A. Dike, Warden S. Minkler and Daniel J. Tolman, setting out that on January 29, 1884, the Garden City Warehouse Company was organized as a corporation, for the purpose of carrying on a general warehouse and storage business, the capital stock

being $120,000; that the stockholders were said defendants and the complainants; that the stock of the complainants had been fully paid; that prior to the organization of the corporation the Dikes and Minkler, under the firm name of Dike Brothers & Minkler, had been engaged in the warehouse and storage business, in the manufacture and sale of refrigerators, and in buying and selling goods and merchandise and negotiable paper; that on January 30, 1884, the firm of Dike Brothers & Minkler sold and assigned all its assets to the Garden City Warehouse Company, and that in consideration thereof the members of said firm received shares of the capital stock of the corporation, amounting, in the aggregate, to $80,000; that Albert E. and Henry J. Dike, Minkler, and the complainants, were elected as the board of directors of the company; that the complainants had no practical knowledge of the warehouse and storage business, and that the affairs of the company were managed almost entirely by the Dikes and Minkler. The bill further shows that the Dikes and Minkler had for a long time been converting, and were then converting, to their own use the property of the company, with intent to defraud the complainants and the creditors of the company, and that to that end the Dikes and Minkler had combined and conspired with the other defendant, Tolman. It is further shown by the bill that on February 25, 1884, the Dikes, Minkler and complainants formed a special partnership, under the firm name of Dike Brothers, Minkler & Co., for the purpose of manufacturing and selling refrigerators, and buying and selling goods and negotiable paper; that the Dikes and Minkler were the general partners, and complainants the special partners; that the business of the firm was managed by the general partners; that the special firm had assumed to succeed to the business of the former firm of Dike Brothers & Minkler, with the exception of the warehouse and storage business. The bill then shows that on April 7, 1884, in pursuance of the said conspiracy between the Dikes, Minkler and

Tolman, the said Dikes and Minkler executed to Tolman their judgment promissory note, dated April 5, 1884, signed by themselves, individually, and also as Dike Brothers, Minkler & Co., for $17,500, payable on demand; that on April 7, 1884, judgment was entered upon said note by confession, in favor of Tolman, and against the Dikes and Minkler, as general partners in the said firm of Dike Brothers, Minkler & Co., and on the same day an execution was issued on the judgment, and levied upon a large amount of property, describing it, which property all belonged to the Garden City Warehouse Company; that there was no consideration for the giving of the note. The bill further shows that on the said 7th day of April, 1884, in pursuance of the said conspiracy, and in the firm name of Dike Brothers, Minkler & Co., the said Dikes and Minkler executed to Tolman, without any good or valuable consideration, an instrument in writing, which purported to be a bill of sale of a large amount of personal property, describing it, and by a general description, all the goods, wares, merchandise, property and effects of the said firm of Dike Brothers, Minkler & Co.; that at the time said bill of sale was made, the said firm of Dike Brothers, Minkler & Co. did not own any property, and that all of said property belonged to the said Garden City Warehouse Company. The bill further alleged that a large number of suits had been commenced against the Garden City Warehouse Company; that the principal part of its property had been seized, on execution or attachment; that the corporation was insolvent, and had ceased doing business, leaving a large amount of debts unpaid; that the property levied on would be sacrificed if sold at sheriff's sale. The bill prayed for the dissolution of the corporation, for the application of its assets to the payment of its debts, for an injunction against the officers of the corporation and the Dikes, Minkler and Tolman, restraining them from any interference with the property aforesaid, or with any of the property of the Garden City Warehouse Company, and for

the appointment of a receiver. An injunction was granted in accordance with the prayer of the bill, and subsequently a receiver was appointed.

On June 16, 1884, an order was entered by the circuit court that defendant Tolman appear before the master in chancery and assign and deliver over to the receiver, first, all the property transferred to or received by him under said bill of sale; second, all the property, money, things in action, or effects, to which the firm of Dike Brothers & Minkler have a legal title, or in which said last mentioned firm had any equitable interest on the 30th day of January, 1884, or at any time subsequent thereto, which were received by him (said Tolman) under or by virtue of said bill or bills of sale, or otherwise, from the said firm of Dike Brothers, Minkler & Co., and all books, papers and vouchers relating thereto, in his possession or under his control; third, all property of the Garden City Warehouse Company in the possession or control of Tolman; and fourth, the proceeds of all the aforesaid property.

The master summoned Tolman to appear before him, and directed him to execute a formal assignment, drawn in the language of the order, which Tolman refused to do, assigning as a reason that the assignment was not in accordance with the order. The master made report. On the hearing thereupon, before the court, on September 27, 1884, the court ordered Tolman to execute the deed of assignment, which was then tendered him, which he refused to do, whereupon the court made the order of commitment in question, of Tolman, to the common jail of the county, for contempt of court by refusing to execute the assignment.

Mr. JESSE HOLDOM, and Mr. FRANK J. SMITH, for the appellant:

A proceeding for a contempt is in the nature of a criminal proceeding, and as its effect is to deprive of liberty, every step provided by law for the attainment of that result must

be substantially, if not strictly, pursued, as in the case of *Stuart* v. *People*, 3 Scam. 593. A rule must be entered to show cause, giving an opportunity to answer the same. We think the court erred, and that the order committing appellant to jail was unlawful. *Buck* v. *Buck*, 60 Ill. 105.

The order of committal is a final order, in the sense that it may be reviewed by appeal or on writ of error. *Cromartie* v. *Commissioners*, 85 N. C. 211; *Hunahausen* v. *United States Fire Ins. Co.* 5 Heisk. 702; *State* v. *McKinnon*, 8 Oreg. 487; *People* v. *Healy*, 58 Barb. 564; *Railroad Co.* v. *Wheeling*, 13 Gratt. 40; *People* v. *Simonson*, 9 Mich. 492; *People* v. *Jones*, 33 id. 303; *Haines* v. *Haines*, 35 id. 138; *Blake* v. *Blake*, 80 Ill. 512; *People* v. *Stuart*, 74 id. 63; *People* v. *Perfinbrink*, 96 id. 68; *Haines* v. *People*, 97 id. 161.

Mr. JOHN E. BURKE, for the appellees:

No rule was necessary—appellant waived one by appearing and making his defence. *People* v. *Hackley*, 24 N. Y. 74.

Under the order of June 16, appellant can be required to make a formal transfer in writing. 1 Bouvier's Law Dic. title, "Assignment;" *Chipman* v. *Sabbaton*, 7 Paige, 47; High on Receivers, sec. 446.

That order was interlocutory, and no appeal or writ of error lies from it. 2 Daniell's Ch. Pl. 1587; *Beebe* v. *Russell*, 19 How. 283; *Chapman* v. *Hammersley*, 4 Wend. 173; *Coates* v. *Cunningham*, 80 Ill. 467.

The court, having jurisdiction of the parties and of the subject matter, had power to make the order of June 16; and such order, even if erroneous, must be obeyed, until the judgment of the court is reversed. *People* v. *Sturtevant*, 5 Seld. 363; *Deklyn* v. *Davis*, Hopk. 135; *Sullivan* v. *Judah*, 4 Paige, 444; *Wilcox* v. *Jackson*, 13 Pet. 511; *Rhode Island* v. *Massachusetts*, 12 id. 718; *Fennings* v. *Humphreys*, 4 Beav. 1; *Walton* v. *Dwelling*, 61 Ill. 201; *Darst* v. *People*, 62 id. 306; *Dickey* v. *Reed*, 78 id. 261.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Objection is taken to the manner of procedure in this case. It is said that a rule should have been entered to show cause, to which an opportunity should have been given to answer; that appellant was not allowed any opportunity to purge himself, or show any reason why he should not be punished for having refused to execute the assignment. Appellant was present in person before the court on the hearing of his refusal to make the assignment, made no objection to then proceeding therewith, and was fully heard, by himself and counsel, in the matter, and after such hearing he was ordered by the court to execute the assignment, and refused so to do. This was a contempt committed in the face of the court, and the court was justified in making the order of commitment without the taking of any of the preliminary steps which it is suggested should have been taken.

As appellant had, by his answer under oath, denied all the charges of fraud and conspiracy, and stated that the confession of judgment was for a *bona fide* debt due, and that the bill of sale was executed to secure the same debt, and as the hearing on which the order of June 16, 1884, for the assignment was made, was upon the sworn bill and the sworn answer of appellant, read as an affidavit, without any other evidence, it is insisted that upon such showing only there was no warrant for making an order taking the property transferred by the bill of sale, out of the hands of appellant, and handing it over to a receiver. No such objection as this can now be taken to that order of June 16. That was but an interlocutory order, made in the progress of the cause, for the preservation and holding of the property during the litigation, and is not the subject of appeal. (*Coates* v. *Cunningham*, 80 Ill. 467; *Chapman* v. *Hammersley*, 4 Wend. 173; *Forgay* v. *Conrad*, 6 How. 201.) No mere error in that order, as is that complained of as above, can now be considered,

but only whether there was jurisdiction in the court to make the order. The appeal is from the order of commitment of September 27, 1884, and not from the order of June 16, 1884, for the making of the assignment.

But, then, it is said, that conceding that it was equitable, and within the scope of the bill, to enter an order upon the motion made, yet the order entered, of June 16, is broader than the facts of the case, the allegations of the bill, or the disclosures made by any of the papers on file, warranted the court in making; that no allegation of the bill gave the court jurisdiction to make the order of June 16, and therefore the court had no jurisdiction of the property ordered to be turned over by appellant to the receiver. The respect in which the order is alleged to be too broad is in the language of the second provision, "*or otherwise*, from said firm of Dike Brothers, Minkler & Co.," thus requiring appellant not only to assign all the property which he had received under the bill of sale mentioned in the bill, but all the property he had received otherwise from the firm of Dike Brothers, Minkler & Co. It was not the purpose of the bill to interfere with the firm of Dike Brothers, Minkler & Co., and lay hold of any property belonging to it, but only to reach property of the corporation; and the charge against appellant was, that he had fraudulently received, under the bill of sale made by Dike Brothers, Minkler & Co. to him, property belonging to the corporation; and if it be the true construction of the order that it required the assignment of other property than property of the corporation, or property alleged as belonging to it, then the order, in that respect, would be too broad, and wrong. But it does not follow that appellant would be justified in disobeying the order for that reason. That would depend upon whether or not the court had jurisdiction. The principle is of universal force that the order or judgment of a court having jurisdiction, is to be obeyed, no matter how clearly it may be erroneous. (*People* v. *Sturtevant*, 5 Seld.

263; *Sullivan* v. *Judah*, 4 Paige, 444; *Fennings* v. *Humphrey*, 4 Beav. 1; *Chuck* v. *Cremer*, 2 Phill. Ch. 112; *Richards* v. *West*, 2 Green's Ch. 456; 2 Barb. Ch. 274.) This has often been held in reference to disobedience to injunctions, as in the cases above, and the principles which govern cases of contempt for a violation of an injunction order are applicable here.

There was, here, jurisdiction over the parties. The court had power to dissolve the corporation, to grant the injunction prayed for, to appoint a receiver and to place the property of the corporation in the hands of the receiver. The order of June 16 was made in the exercise of that power, and if the order embraces property not shown by the bill to belong to the Garden City Warehouse Company, this would seem to be but an error in the exercise of jurisdiction. If it had been made to appear to the court that appellant had in his possession property of the corporation received from Dike Brothers, Minkler & Co., other than that received under the bill of sale mentioned, we think the court might then properly have required such property to be turned over to the receiver, although there was no allegation in the bill of the receipt of the property. If that be so, it must be allowed that the court had jurisdiction of the subject matter, and that the error in the order was in its not being sustained by proof to the extent it was made. The test of jurisdiction would be the allegations of the bill,—not the proof made under it.

The order of June 16, at the most, was not wholly void, but only in the particular wherein it is complained of as being too broad. Appellant's proper remedy would have been an application to the court to modify the order in that respect. There was no such application. There was no such objection made to the order. The objection, before the master, to executing the assignment prepared, was, that it did not conform to the order of June 16. Before the court there does not appear to have been any reason given for refusing to execute the assign-

ment. There was no offer or willingness ever expressed to execute any assignment to the extent it is not objected to, as being to broad.

We are of opinion the judgment of the Appellate Court should be affirmed.

Judgment affirmed.

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SJOERD TUNESMA

v.

PETER SCHUTTLER.

Filed at Ottawa May 15, 1885.

1. CHANCERY—*jurisdiction to enforce legal rights, as distinguished from those which are merely equitable.* It does not follow that because rights are legal ones they are not cognizable in a court of equity. If there are any equitable conditions authorizing that court to act at all, it will, if necessary to do complete justice, enforce legal as freely as equitable rights. In exercising its jurisdiction when it has once attached, it is wholly immaterial whether the rights to be enforced are purely legal or are merely equitable in their character.

2. SAME—*stockholders' liability—enforcement in chancery—to the exclusion of the remedy at law.* A bill filed by certain creditors of an insolvent banking corporation, on their behalf and for all other creditors, against the several stockholders in the same, alleged the insolvency of the bank, a deficiency in assets to pay its creditors, the personal liability of stockholders, under the charter, to the depositors and creditors, the existence of some nine hundred unpaid depositors, some of whom were seeking, by separate suits at law, to get an advantage over the others, and that such separate litigation would waste and exhaust the proceeds of this liability of stockholders, the only fund to which depositors could look for payment, and asking to have an account taken of all the liabilities of the bank, and establish the amount for which the various stockholders were liable personally, and to have the amount of the debts proven apportioned among the stockholders: *Held*, that the bill clearly showed a case for equitable relief, and gave the court jurisdiction of the subject matter.

3. The fundamental principle upon which bills of this kind are maintained, is, equality of benefit and burden among a numerous class of persons similarly situated, in respect to a particular fund. The principle that equality is equity, is one of the most fruitful sources of equity jurisdiction.

Statement of the case.

4. SAME—*conclusiveness of decree in such a case, both as to persons and remedies.* A decree of a court of equity fully adjudicating and settling the extent of the personal liability of all the stockholders of an insolvent corporation, upon a proper bill filed for that purpose by certain creditors, for themselves and all other creditors who might come in and prove their demands, is binding and conclusive upon all creditors making themselves parties to the suit, no matter if it may be erroneous, in all collateral suits and proceedings.

5. So in this case, a bill was filed by certain creditors of an insolvent bank, in behalf of themselves and all other creditors, seeking the appointment of a receiver, etc., under which one was appointed, and an order or decree was rendered therein directing the receiver to pay to the creditors seventy per cent of the par value of their claims. After this, an amended and supplemental bill was filed, making the bank and all its stockholders parties, and asking for a decree to compel the stockholders to pay a sum sufficient to discharge the balance of the debts, and the receiver filed a similar petition. During the pendency of the three last bills, a creditor of the bank, not a party to the bill by name, came in and received his dividend of seventy per cent from the receiver. The court then referred the case to the master, who, after having given notice to all persons to prove their claims, found the amount of the same, and the amount of the deficiency of the assets coming to the receiver,—which finding was approved, and the stockholders decreed to pay a certain amount which was required to satisfy all the debts in full, which was done, and the stockholders discharged from further liability: *Held*, that the final decree was binding upon such creditor who came in and received his dividend, the same as if he had been a party by name, and that such decree was a bar to any suit at law by him against a stockholder who had paid his share under the decree.

APPEAL from the Appellate Court for the First District;—heard in the court on appeal from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action brought by the appellant, in the circuit court of Cook county, against the appellee, as a stockholder of the late German Savings Bank of Chicago, to recover a balance of $2624.88 due him as a depositor of said bank. The action is founded on the 9th section of the charter of the bank, which is as follows: "When default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of the stock held

by them, respectively; and such liability shall continue until six months after an assignment of the stock, and publication of a notice thereof in a newspaper published in the city of Chicago."

To the declaration, which showed a *prima facie* right of recovery, the defendant filed, among others, the following plea, which is designated in the record as the fourth amended plea:

"And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that heretofore, to-wit, on the 7th day of December, 1877, the said German Savings Bank ceased to do business, and thereupon, on said day, in the Superior Court aforesaid, one Herman G. Berls and other creditors of said bank, on behalf of themselves and of all other creditors of said bank, filed their certain bill of complaint, on the chancery side of said court, against said company, praying that a receiver of the assets and property of said bank be appointed, and that said bank be declared insolvent, and its affairs wound up, its assets collected and its debts paid under the direction of said court; that thereupon such proceedings were had in said court that on the 8th day of December, 1877, said bank was by said court declared to be insolvent, and one Oliver H. Horton was by the order of said court appointed receiver of said bank, of all its property and assets, and empowered to collect and dispose of the same for the purposes as prayed in said bill; that thereupon such proceedings were had in said court that by an order therein entered on the 27th day of June, 1882, said receiver was authorized and directed, out of the moneys then in his hands, to pay unto the creditors of said bank a dividend of seventy per cent upon the par value of their respective claims; that afterwards, to-wit, on the 3d day of July, 1882, the said complainant, Berls, and others, for themselves and all other creditors of the said bank, filed in said cause, in the court

aforesaid, their amended and supplemental bill, making the said bank, and all stockholders thereof at the time of its insolvency aforesaid, including this defendant, Peter Schuttler, parties defendant thereto, and alleging the incorporation of said bank, and the acceptance of its charter, the insolvency of the said bank, the insufficiency of its assets then in the hands of the said receiver to pay its debts, and setting up the liability of said stockholders for the deficiency thus arising, as the said plaintiff has in his above declaration set out, and praying that the said defendant stockholders might be required to pay such deficiency by reason of such liability; that thereupon, on the 5th day of July, 1882, the said receiver filed his petition in said cause, setting forth, substantially, the same facts in said amended supplemental bill set forth, to which petition said stockholders, including this defendant, Peter Schuttler, were made parties defendant, and praying that any decree upon said amended and supplemental bill be made payable to him, the said receiver, for the benefit of all the creditors of the said German Savings Bank, and praying for the instruction of the court in the premises; that thereupon such proceedings were had, on the —— day of July, 1882, the said creditors of said bank, who had also brought suits at law against the individual stockholders, as above set out, were, by preliminary injunction of said court, restrained from further prosecution of said suits until the final hearing of said cause; that during the pendency of said supplemental and amended bill, to-wit, on the 21st day of July, 1882, the said plaintiff asked for and received from the receiver in the said cause the sum of $3062.34, as and for his dividend of seventy per cent upon its par value upon his said claim against the said bank, which said dividend was then paid by said receiver out of the assets of the said bank itself; that afterwards issues were joined upon said amended and supplemental bill and petition, and such proceedings were had by the said court that on the 27th day of January, 1883, upon the hearing of

said cause upon said amended and supplemental bill and the petition of said receiver, the court found the facts to be as set out in said amended and supplemental bill, and it was theretofore decreed by the said court that the said defendant stockholders, including this defendant, Peter Schuttler, were liable for the debts and liabilities of said bank to its creditors, as set forth in said amended and supplemental bill and petition, and as said plaintiff has in his said declaration above set out, and that the said Peter Schuttler was liable in the sum of $5000. It was further decreed by the court, before entering the final decree in said cause, that the same be referred to Benjamin D. Magruder, master in chancery in said court, to ascertain the amount due the creditors of said bank, and the amount necessary to defray the expenses of closing up said proceedings, and the amount necessary to pay such claims as might be proven against said bank. And it was further ordered, as follows: That said master shall give notice, by publication in the 'Chicago Daily News,' and the 'Illinois Staats Zeitung,' to all the creditors of the German Savings Bank to appear before him on or before a certain day, not less than twenty days from the date of such notice, to be by him fixed, and prove and establish their claims and the amount due them, and the said master shall thereupon report to this court his conclusions, together with the evidence taken by him touching the same; that thereupon the said master gave the notice in the manner and form required by the said decree, beginning on February 1, 1883, and fixed the 24th day of February, 1883, and all intervening days, as the time, and his office in Chicago as the place, for the creditors of said bank to prove their claims against the same; that afterwards, by an order of said Superior Court in said cause, the time for proving such claims was extended until March 16, 1883; that on May 5, 1883, the said master duly filed in said Superior Court his report of said claims, etc., as required by said decree of January 27, 1883, and setting

forth the notice given by him in pursuance thereof, as aforesaid; and thereupon such proceedings were had in said cause that on the 27th day of May, 1883, it was decreed by said Superior Court in said cause, that said report be approved, and that the assets of said bank were insufficient to pay the claims of said bank so proven and allowed; that the said Oliver H. Horton, the said receiver, for the use of all the creditors of said bank, have and recover from the stockholders of said German Savings Bank who were defendants in said cause, and including this defendant, Peter Schuttler, the sum of four thousand six hundred and four dollars and seventy-five cents ($4604.75,)—the amount of such deficiency; and that upon payment thereof to him, the said Horton should satisfy the said judgment against all of said stockholders, including this defendant, Peter Schuttler, as a final release of the liability of the said stockholders. And it was further ordered, that if any stockholder shall pay more than his *pro rata* share according to the amount of said stock held by him, he should be entitled to contribution from the other of said stockholders, and may apply to this court and have relief in this cause; that afterwards, to-wit, on the 14th day of July, 1883, the said Horton, as such receiver, received payment of said sum of $4604.75 from said stockholders, including this defendant, and entered due and full satisfaction of said judgment and decree upon the records of said Superior Court in said cause, and acknowledged therein that he had received payment thereof from the said stockholders, including this defendant, Peter Schuttler, and that such payment was in full of all such liability of such stockholders and this defendant, Schuttler, as by the record thereof still remaining in the said Superior Court, and by a duly certified copy of said amended and supplemental bill, the two decrees of said court therein, and the receipt of said Horton hereto attached, marked 'Exhibit A,' and made part hereof, more fully appears, which said judgment and record still remains in full force,—and this the

defendant is ready to verify by the said record, whereof he prays judgment if the plaintiff ought to have his aforesaid action," etc.

To this plea the plaintiff replied that "he had no knowledge of the proceedings had under and in pursuance of said supplemental bill and receiver's petition mentioned in said plea, and was not a party thereto, and received none of the benefits arising therefrom, and that said court of chancery had no jurisdiction of this plaintiff nor of the subject matter constituting the plaintiff's cause of action herein," etc.

The court sustained a demurrer to the replication, and the plaintiff declining to make any other or further answer to the plea, judgment was thereupon entered against him for costs, which having been affirmed by the Appellate Court for the First District, the plaintiff appealed to this court.

Mr. JOHN W. LANEHART, and Mr. JOHN P. ALTGELD, for the appellant:

The doctrine that where there are many parties interested in a common fund, any one may commence an action on behalf of himself and all others without naming them, and that the chancellor in such a case may require all to establish their claims within a specified time, failing in which they will be barred, is not new. It is discussed and clearly stated in *Hallett* v. *Hallett*, 2 Paige's Ch. 16. This, in fact, is the leading case on this subject, and is the authority relied on by Barbour in his work on Parties, as well as by other writers. But the court there distinctly says that in all this class of cases the proceedings are *in rem*,—*i. e.*, are against a fund in the hands of the court, as, for example, the assets of the bank in the hands of the receiver. But in the present case the liability of the stockholders did not constitute a fund in the hands of the court, and under the control of the receiver, for the receiver represented the bank. He could sue for and collect any money due the bank, but the liability of the stock-

holders did not run to the bank, and the bank never could enforce it; and if the bank could not, the receiver could not, for he represented only the bank. He could not act in a dual capacity, and represent both the bank and its creditors.

Mr. EUGENE E. PRUSSING, for the appellee:

The circuit court, in chancery, had jurisdiction of the person of appellant, although he was not a party by name. Story's Eq. Pl. secs. 97, 99; Barbour on Parties to Action, 553; Freeman on Judgments, sec. 157; *Ryan* v. *Lynch*, 68 Ill. 160.

That court had jurisdiction of the subject matter of the proceedings under the amended and supplemental bill. *Wincock* v. *Turpin*, 96 Ill. 135; *Eames* v. *Doris*, 102 id. 350.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The decision of this case depends entirely upon the sufficiency of the fourth amended plea, for if it does not present a defence to the action, the demurrer should have been sustained to it, and not to the replication, as was done. On the other hand, if the plea is good, it is quite clear the replication affords no answer to it. Its sufficiency, of course, depends upon the validity of the proceedings under the original bill and supplemental bill, mentioned in the plea,—or, differently expressed, upon whether the court had jurisdiction of the person and subject matter of the suit in those proceedings.

With respect to the proceedings and orders made under the original bill, up to the time of filing the supplemental bill, their regularity and validity do not seem to be questioned. The controversy relates entirely to what was done under the supplemental bill, the contention of appellant being that the rights of depositors, under the 9th section of the charter, are purely legal, and enforcible only in a court of law. It may be conceded that the rights in question are purely legal, as contradistinguished from equitable, rights, but it does not neces-

sarily follow that they are cognizable in a court of law only, for when equitable conditions are present authorizing a court of equity to act at all, it will, if necessary to do complete justice, enforce legal as freely as equitable rights. In exercising its jurisdiction, when it has once attached, it is wholly immaterial whether the rights to be enforced are legal or equitable.

Wincock v. *Turpin*, 96 Ill. 135, is cited as an authority against the jurisdiction of a court of equity to enforce the rights of depositors under a charter provision similar to the one now under consideration. It is true the bill in that case was for the purpose of enforcing a liability of the same kind as that now under consideration, and that the right to relief, under the bill as framed in that case, was denied; but the case does not decide that a bill will not lie in any case to enforce this liability. The very contrary is, in effect, admitted. Thus it is said: "It may be a state of facts might exist which would authorize a court of equity to bring before it all the stockholders and depositors, and determine their rights and adjust equities, marshal the fund, and distribute it *pro rata;* but no such case is made by this bill, and until such a case shall be made we must leave the depositors to pursue their remedies under the law." That case was disposed of in the court below upon a demurrer to the bill. The chancellor being of opinion sufficient was shown to warrant the relief prayed, a decree was entered accordingly. On appeal to this court the decree was reversed, this court being of opinion that the case made by the bill was not sufficient to warrant the court to interfere with the depositors in pursuing their legal remedies, and this is all that is really decided by that case. It is there distinctly said: "This bill is singularly indefinite as to the manner or the grounds of liability of the stockholders. It is not alleged that they are liable for the unpaid balance of their stock, or under the clause in the charter which renders shareholders liable to the depositors to the amount of the shares of stock held by them, or that their liability

was not incurred in some other manner. The bill is too indefinite, vague and uncertain to sustain a decree granting the relief sought." Thus it will be seen the decision itself is confined within very narrow limits, and that it was concurred in by a bare majority of the court. It is true the argument of the court, as is most always the case, takes a somewhat wider range; but it is well understood, and hardly necessary to be repeated, that the general expressions in an opinion not necessary to a decision of the case, are always to be limited by the facts directly in issue.

With the language of the opinion in that case thus limited, we see nothing in it to justify the conclusion that a bill of this kind will not lie under any circumstances, but, as already stated, the very contrary is conceded. All doubt on this question, however, is completely removed by the later case of *Eames* v. *Doris*, 102 Ill. 350, which expressly holds that a bill of this kind will lie, so that the only question now is, so far as the present inquiry is concerned, do the facts stated in the bill under consideration bring the case within the general principle or rule established by that case? We have no hesitancy in saying they do. The insolvency of the bank, deficiency in assets to pay creditors, the personal liability of stockholders to the depositors, the existence of some nine hundred unpaid depositors, some of whom were trying, by separate suits at law, to get an advantage over the others, and that such separate litigation would waste and exhaust the proceeds of this liability of the stockholders, the only fund to which depositors could look for payment, is all clearly stated in the bill. This was sufficient. The fundamental principle upon which bills of this kind are maintained, is equality of benefit and burden among a numerous class of persons similarly situated, in respect to a particular fund. The principle that equality is equity, has its foundations deeply laid in equity law, and is one of the most fruitful sources of equity jurisdiction.

The proceedings set forth in the plea seem to have been conducted with special reference to those in the *Eames-Doris case, supra*, which have received the approval of this court, and we are fully satisfied with all that was said in that case. That the liability of the stockholders of the German Savings Bank, under the 9th section of its charter, was adjudicated and settled by the final decree in the proceedings under consideration, is not to be denied, and it must be conceded, if the court had power and jurisdiction, as against the appellant, to render it, it is wholly immaterial whether the decree is erroneous or not, for until reversed or otherwise annulled and set aside, it is just as binding in the one case as the other.

Having reached the conclusion that the matter set up in the supplemental bill was equally cognizable in a court of equity with that disclosed by the original bill, it follows there is no ground for the claim of appellant, so far as it is based upon the difference in the subject matter of the two bills, that he may be bound by what was done under the one, and yet not be bound by what was done under the other. Upon filing the supplemental bill July 3, 1882, the two bills in effect became one bill, as much so as if the new matter had been engrafted upon the original bill by way of amendment. (*Gillet* v. *Hall*, 13 Conn. 426; *Hill* v. *Hill*, 10 Ala. 527.) After this, to-wit, on the 27th of the same month, appellant came in and accepted of the receiver his *pro rata* share of the money then in the receiver's hands for distribution, under an interlocutory order in the cause. While his name was not mentioned in the bill, either as plaintiff or defendant, yet the suit was commenced on his behalf as much as it was on behalf of the complainants expressly named, and by coming in and proving his interests he was entitled to the same benefits of the litigation, in proportion to the amount of his claim, as they were. This right appellant exercised under the first order of distribution, and if he subsequently neglected his interests, as he appears to have done, he must abide the

consequences. By coming in and availing himself of part of the fruits of the litigation he took the position of a complainant in the bill, and in doing so he is conclusively presumed to have had notice of all steps taken in the case up to that time, and having taken the position of a complainant, he can not be heard to set up his ignorance of what occurred in it afterwards.

For the reasons stated, we are of opinion the judgment of the trial court was in conformity with the law, and that consequently it was properly affirmed by the Appellate Court.

Judgment affirmed.

LILLIE WILLIAMS

v.

GEORGE H. FORBES, Admr.

Filed at Ottawa May 15, 1885.

1. APPEAL—*reviewing facts—when found by the Appellate Court.* The statute makes it the duty of the Appellate Court, where its judgment is the result of its finding the facts differently from that of the trial court, to state, in its final judgment or decree, the facts as found by it; and when that court does so recite its finding, its decision as to the facts found is conclusive, and can not be reviewed by this court.

2. GIFT—*revocable until executed—and when considered as executed.* A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. In such case the gift is not executed until the note is paid.

3. CONSIDERATION *of a promissory note intended as a gift.* A promissory note, executed without any other consideration than that of natural affection, or one without any valuable consideration, intended as a mere gift, can not form the ground of a recovery in an action at law.

APPEAL from the Appellate Court for the Second District; —heard in that court on appeal from the Circuit Court of Jo Daviess county; the Hon. JOHN V. EUSTACE, Judge, presiding.

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Mr. M. D. BROWN, and Mr. JACOB FAWCETT, for the appellant:

It is enough that the consideration of the note is a good one, although it is not adequate. Any obligation entered into voluntarily, and for a good consideration, is valid at common law, and binds the parties. *Wolf* v. *McClure*, 79 Ill. 564.

Where the object of a contract is lawful, and is founded on a good consideration, and is entered into by parties capable of contracting, it creates a legal obligation, and can be enforced according to its terms. *Railroad Co.* v. *McNeely*, 21 Ill. 71.

Considerations are good, as, when they are for natural love and affection, or valuable, when some benefit arises to the party by whom they are made, or inconvenience to the party making them. Viner's Abridg. consideration "B;" *Phillips* v. *Preston*, 5 How. 278; *Shirly* v. *Harris*, 3 McLean, 330; *Clark* v. *Sigourney*, 17 Conn. 511.

The court can not inquire into the adequacy or inadequacy of the consideration; only, is it good or valuable. 2 Leading Cases in Eq. 1685.

A note given for value received, and "his kindness to me," would be good, the first part of the sentence denoting an adequate consideration. *Woodbridge* v. *Spooner*, 3 B. & A. 235; Daniells on Neg. Instr. 142.

Numerous authorities may be cited to show that the consideration need not be equal in dollars and cents, or in actual value, to the amount of the money expressed on the face of the note, and reference for that purpose is had, besides those already given, to the following: *Baker* v. *Walker*, 14 M. & W. 465; 1 Parsons on Contracts, 361; 2 Parsons on Bills, 524; *Johnson* v. *Titus*, 2 Hill, 606; *Oakley* v. *Boorman*, 21 Wend. 588; *Robinson* v. *Raynor*, 28 N. Y. 494; *Parish* v. *Stone*, 14 Pick. 198; *Bucklin* v. *Bucklin*, 1 Keys, 141; *Lobdell* v. *Lobdell*, 36 N. Y. 327; 1 Domat, (Cushing's ed.) 401; *Freeman* v. *Freeman*, 51 Barb. 306; *St. Mary's Church* v. *Cogger*, 6 id. 876; 1 Greenleaf on Evidence, sec. 189.

A note made, delivered and accepted in the lifetime of the maker, payable at or after his death, is not in any sense a testamentary disposition. (*Worth* v. *Case*, 42 N. Y. 362; *Jackson* v. *Culpepper*, 3 Kelly, 569; *Cummings* v. *Cummings*, id. 460.) And it is irrevocable. *Bristol* v. *Warner*, 19 Conn. 7; 10 Mass. 177; *Conn* v. *Thornton*, 46 Ala. 587.

Messrs. D. & T. J. SHEEAN, and Mr. ROBERT D. RUSSELL, for the appellee:

The finding of the facts by the Appellate Court, is, by statute, made conclusive upon this court. *Hayward* v. *Merrill*, 94 Ill. 350; *Thomas* v. *Insurance Co.* 108 id. 91; *Pulsifer* v. *Winterhoff*, 102 id. 400; *Village of Genoa* v. *Van Alstine*, 108 id. 555; *Furnace Co.* v. *Magill*, id. 656; *Moore* v. *People*, id. 484.

Natural affection does not constitute a valid consideration for a promissory note, and one can not make a gift of his own promise. *Kirkpatrick* v. *Taylor*, 43 Ill. 207; *Blanchard* v. *Williams*, 70 id. 647; *Arnold* v. *Franklin*, 3 Bradw. 141; *Forbes* v. *Williams*, 13 id. 280.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

Lillie Williams brought suit in the county court of Jo Daviess county, against George H. Forbes, as administrator of the estate of Delilah Deeds, deceased, on the following instrument:

"PLEASANT VALLEY, ILL., *Oct. 25, 1875.*

"Whereas my niece, Lillie Williams, has performed for me personal service for a long period of time, for which I desire she shall receive ample compensation from my estate, and not feeling able, at present, to fully compensate her, I therefore and hereby acknowledge myself indebted to her in sum of $2500, with interest, but not to be due until my death, unless at my option. DELILAH DEEDS."

On trial in that court, judgment was rendered for the defendant. The plaintiff appealed to the circuit court of Jo Daviess county, and on trial in the circuit court, before a jury, the plaintiff recovered judgment for $3708.75. The defendant then appealed to the Appellate Court for the Second District, and that court, on hearing, reversed the judgment of the circuit court, and refused to remand the cause. In the order of the Appellate Court reversing the judgment of the circuit court, occurs the following: "The judgment of this court being in consequence of finding the facts differently from that found by the court below, this court finds the facts to be, that the note sued on, and which is the foundation of the claim of appellee in this case, was given by Delilah Deeds, deceased, without any consideration whatever; that it was a mere gift, intended by Delilah Deeds, deceased, to be given to appellee in the nature of a testamentary bequest; and that there is no other cause of action, or supposed cause of action, save the note, claimed by appellee in this suit." The present appeal is from that judgment.

The argument addressed to us by counsel for appellant, is one that should have been addressed to the Appellate Court, upon petition for rehearing. It is purely a discussion of facts to establish that the Appellate Court erred in finding the facts differently from what they were found to be by the circuit court. No ruling on any question of law was excepted to, which is now pressed as ground of error. Indeed, the only question of law which, on the finding of facts by the Appellate Court, it is possible now to raise, is whether, on those facts, the law authorizes or precludes a recovery. Section 87 of the Practice act, as amended by the act of June 2, 1877, in force July 1, 1877, (Pub. Laws of 1877, p. 153,) provides: "If any final determination of any cause, as specified in the preceding sections, shall be made by the Appellate Court, as the result, wholly or in part, of the finding of the facts concerning the matter in controversy different from the finding

of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such Appellate Court to recite in its final order, judgment or decree the facts as found; *and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause.*" This language needs no interpretation, and it is impossible, by construction, to import a meaning into it not apparent upon its face. We can add no words to make its meaning more intelligible. The decision of the Appellate Court, in such cases, being conclusive as to all matters of fact, we can not review them. Whether the finding of that court is right or wrong, that is the end of it,—and so we have expressly held in *Harzfeld* v. *Converse*, 105 Ill. 534. See, also, to like effect, *Hayward* v. *Merrill*, 94 Ill. 350; *Thomas* v. *Fame Ins. Co.* 108 id. 91; *Tenney* v. *Foote*, 95 id. 99; *Missouri Furnace Co.* v. *Abend*, 107 id. 44.

It is not an open question, in this court, what is the law, on the facts as found by the Appellate Court. A note executed without any other consideration than that of natural affection, or one without any valuable consideration, intended as a mere gift, can not form the ground of recovery in an action at law. A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. The gift is not executed until the note is paid. (*Kirkpatrick* v. *Taylor*, 43 Ill. 207; *Blanchard* v. *Williamson*, 70 id. 647; *Pratt, Admx.* v. *Trustees*, 93 id. 475.) It is not pertinent for us, here, to inquire how slight a valuable consideration would support this promise, for the Appellate Court finds, as a matter of fact, that it is supported by *no* valuable consideration,—that the promise is to make a gift, only.

The judgment is affirmed.

Judgment affirmed.

F. M. BRADSHAW

v.

THE STANDARD OIL COMPANY.

Filed at Ottawa May 15, 1885.

1. APPEAL AND ERROR—*whether action is one sounding in damages.* An action of assumpsit to recover damages for the breach of a contract, whereby the plaintiff alleges he has lost the good will of an established business, though in form an action *ex contractu*, is an action sounding in damages, within the meaning of section 8 of the Appellate Court act, and no appeal or writ of error lies to review the judgment of the Appellate Court affirming a judgment in such a case for less than $1000.

2. An action sounding in damages, within the meaning of the statute relating to appeals and writs of error from or to the Appellate Court, is one where the damages can not be determined in dollars and cents by witnesses, but certain facts are proven, and from those facts the jury determine the amount of damages, as in slander, and the like. The words, "sounding in damages," were intended to include all cases, whether the action is *ex contractu* or *ex delicto*, when the damages are not susceptible of direct proof.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Mr. MILLARD R. POWERS, for the plaintiff in error.

Messrs. FAIRCHILD & BLACKMAN, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by Bradshaw, in the Superior Court of Cook county, against the Standard Oil Company, to recover, in an action of assumpsit, damages for an alleged breach of a contract, whereby he, as is alleged, lost the good will of a certain established business. On the trial, which was had before the court, without a jury, the plaintiff, Bradshaw, recovered a judgment for one cent. This judgment was affirmed in the Appellate Court, and the plaintiff in the action sued out this writ of error.

The defendant in error has entered a motion to dismiss the writ of error, upon the alleged ground that the action is one sounding in damages, and the judgment being for a less sum than $1000, under the statute the decision of the Appellate Court affirming the judgment of the Superior Court is final. The language of the 8th section of the Appellate Court act, which has a direct bearing on the question involved, is as follows: "In all cases determined in said Appellate Courts, in actions *ex contractu*, wherein the amount involved is less than $1000, exclusive of costs, and in all cases sounding in damages wherein the judgment of the court below is less than $1000, exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the Appellate Court, the judgment * * * of the Appellate Court shall be final, and no appeal shall lie or writ of error be prosecuted therefrom." The record discloses the fact that the judgment recovered in the Superior Court was for a less sum than $1000, and that it was affirmed in the Appellate Court. If, then, the action was one sounding in damages, it is apparent, under the terms of the statute, that a writ of error will not lie. Whether the action is one sounding in damages, within the meaning of the statute, we think there can be no doubt. Nothing was claimed to be due for property sold, or for services. The only claim interposed, as appears from the bill of exceptions, was "damages for loss of good will." An action sounding in damages is one where the damages can not be estimated in dollars and cents by witnesses, but certain facts are proven, and from these facts the jury determine the amount of damages,—for instance, an action of slander, assault and battery, malicious prosecution, false imprisonment, and other like cases. Here the claim was loss of good will, and what that might be worth would have to be estimated by the court or jury after the testimony had all been heard. In such a case no witness could give an opinion of the probable value of the loss which plaintiff had sustained, any more than could be given in an action for

slander. The legislature doubtless intended, by the use of the words, "sounding in damages," to include all cases, whether the action might be *ex contractu* or *ex delicto*, where the damages are not susceptible of direct proof. Such is this case.

The writ of error will be dismissed.

Writ of error dismissed.

114	174
132	604
114	174
89a	[2]11
114	174
205	[3]470

PATRICK J. SEXTON

v.

THE COUNTY OF COOK.

Filed at Ottawa May 15, 1885.

1. CONTRACT WITH A COUNTY—*of the mode—by whom—delegation of authority by county board—as to work done outside of contract—ratification by payment.* The county board of Cook county, in July, 1877, passed this resolution: "Resolved, that the contractor on the new court house, P. J. Sexton, be and he is hereby instructed to build as much of the foundation of the dome, under the supervision of the architect, as is necessary to inclose the building, subject to the architect's valuation of the same:" *Held*, that this resolution, when accepted by Sexton, constituted a contract for the building of a portion of the foundation of the dome.

2. The county board alone has power by law to bind a county by contract. There is no such power in an architect, or a committee appointed by the board, unless it has been bestowed by the county board. But the authorized body of a municipal corporation may, by a resolution or vote, clothe its officers, or agents, or committees, with power to act for it.

3. Where a county board, by resolution, directed a party to build so much of the dome of a court house being erected as was necessary to inclose the building, under the architect's supervision, and subject to his valuation of the same, it was *held*, that the architect, under such resolution, had authority only to supervise the work directed to be done, and make a schedule of prices for the same, and that any order of the architect for work outside of the terms of the resolution was not binding on the county.

4. A county board, by resolution, employed a contractor to build so much of the foundation of a dome for a court house as was necessary to inclose the building, the foundation being regarded the part below the ground, and the joint committee, and architect employed to supervise, afterward ordered the contractor to fill in the wall up to the main water-table or level of the first

Statement of the case.

story floor, which was done, and the work paid for, and the architect and committee then directed him to complete the work as far as the roof line of the building, a part of which was done, when further work was ordered by the board to be stopped, and payment was made for all the work which had been done under such orders: *Held*, that the payment for the work done under the orders of the committee and architect, outside of that required in the resolution, was not such a ratification of the subsequent orders made by them as to bind the county, and that the county was not liable to the person doing the work for the profits he might have made if he had not been ordered to discontinue it.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

On July 30, 1877, the board of county commissioners of Cook county passed the following resolution:

"*Resolved*, That the contractor on the new court house, P. J. Sexton, be and he is hereby instructed to build as much of the foundation of the dome, under the supervision of the architect, as is necessary to inclose the building, subject to the architect's valuation of the same."

The architect made a schedule of prices, as follows:

"*August 2, 1877.*

"Dressed ashlar masonry and dressed dimension masonry, throughout, at eighty cents per cubic feet; concrete, in Phinney's cement, at $16 per cubic yard; excavation, $1.50 per cubic yard; cutting and trimming pile-heads, thirty cents each; brick laid in cement and lime, half and half, and grouted, each course best selected brick, to full satisfaction of architect, $12 per thousand. Pile-heads to be measured in concrete, and excavation to pay for expense of scooping out between pile-heads. Cut stone arches and skewbacks to be built on estimated values. All walls measured solid. All work to be in strict accordance with specifications. I fix prices for dome work at the above schedule.

J. J. EGAN."

This paper was indorsed approved by the joint committee on public buildings and public service.

On October 27, 1877, the architect gave the following order to Sexton:

"In compliance with the instruction of joint committee on buildings and service, you will please proceed to prepare and set the cut stone work of county's half of the dome of Cook county court house, up to the top of the main water-table, in accordance with the plans and details of the same, herewith submitted, at a cost of $15,375.

Respectfully, J. J. EGAN."

The "main water-table" above referred to was at the top of the basement story, or first story above the ground. This paper was also marked approved by the above named committee.

On November 3, 1877, the architect gave to Sexton the following further paper:

"*November 3, 1877.*

"P. J. SEXTON—You will please extend the work of the dome so as to comprise the full half of the entire, up to the level of the first or main floor, including the cut stone work of the basement of the county's half of the dome, and thence continue the main internal piers complete up to the roof, subject to the schedule of prices dated August 2, 1877, and signed by me. All cut stone to be subject to special contracts, and to be submitted to the joint committee for approval before being executed. J. J. EGAN."

The same committee indorsed this with their approval.

Sexton made preparation for doing the work, and proceeded therewith until he had constructed about forty-four feet in height of one side of the dome, when, on March 11, 1878, the work was stopped, under a resolution of the county board ordering a suspension of all work on the court house dome until the question of building the dome was settled between

the county and the city. Sexton brought suit against the county, claiming that the several papers above, with his action thereunder, constituted a contract between him and the county for building the dome wall from the basement to the roof of the building, a height of one hundred and twenty-eight feet, and that he was entitled to recover according to the contract price for the work he did do, and the profits for the work that he was ready and willing to do, but did not do because of the stopping of the work. The recovery, by the judgment of the circuit court, was only for the work done. This judgment was affirmed by the Appellate Court for the Second District, and Sexton appeals to this court.

Messrs. SWEET, HASKELL & GROSSCUP, for the appellant.

Mr. WILLIAM LAW, Jr., and Mr. E. R. BLISS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The errors assigned are, the refusing of an instruction asked by the plaintiff, and the giving of two asked by the defendant. The refused instruction asked by plaintiff was:

"If the jury believe, from the evidence in reference to the dome contract, that the board of county commissioners of Cook county passed a resolution authorizing and instructing P. J. Sexton to build as much of the foundation of the dome, under the supervision of the architect, as is necessary to inclose the building, subject to the architect's valuation of the same, and the jury further believe that one of the walls of the foundation of said dome formed also a portion of the west wall of the court house, and said building could not be inclosed without running up said wall, and that thereafter the plaintiff took said order to James J. Egan, the architect of the court house, and said architect in one order fixed the prices of said work, and in another order defined the manner of construction

of said dome, and the extent and limits thereof, and the said Sexton thereupon proceeded and did a portion of the work, and was stopped by the defendant, and on his part was prepared and ready and willing to do all of said work, then Sexton is entitled to recover the value of the work done under the contract, *and the value of the contract for work not done,—or, in other words, he is entitled to the value of the work which he has done, and the profits on the work which remained to be done and was not done.*"

So much of the instruction as is printed in italics the court struck out, and gave the residue of the instruction to the jury. The two instructions given for the defendant were:

"That the resolution of the county board of Cook county adopted July 30, 1877, only authorized the building by Sexton of as much of the foundation of the dome as was necessary to inclose the building, and if the jury believe, from the evidence, that the foundation of the dome did not extend above the level of the basement floor of the court house, then such resolution, when acted upon by Sexton, did not constitute a contract between him and the county of Cook for the building of such dome above such foundations, nor above the level of such basement floor, and the architect, under such resolution, had no power or authority, by virtue of such resolution, to make a valuation of work done by Sexton above such foundation, and bind the county of Cook thereby.

"That notwithstanding the resolution of the county board adopted July 30, 1877, requesting Sexton to build as much of the foundation of the dome, under the supervision of the architect, as was necessary to inclose the building, subject to the architect's valuation of the same, the county board had a right to direct that work on the dome above the foundation be stopped or suspended, and by so doing incur no liability to Sexton for profits on work not done, and the jury will reject all claim in this case for profits on work not done on said dome above the foundation thereof."

In the language of appellant's brief herein, "the design was to erect, upon the public square in the city of Chicago, a joint building, one-half to be erected by the county, and to be used for county purposes, and the other half by the city, and for city purposes, and the intention was that each building should be complete in itself, and that the two buildings should be connected together by an octagonal dome, which, commencing at the ground, should run up about three hundred and sixty-six feet. This dome was so designed that a portion of the east wall of it should constitute (a portion of) the west wall of the court house, and a portion of the west wall should constitute (a portion of) the east wall of the city building. A space of about forty-four feet was left in the building, to be occupied by this dome wall, and when the dome should be erected, it (with the other work contracted to be done) would constitute the entire four walls of the county part of the building."

The resolution of the county board, of July 30, 1877, when accepted by Sexton, constituted a contract for the building of a portion of the foundation of the dome, and we are of opinion that was all the contract that existed between the county and Sexton upon the subject. It is the county board, only, which has authority, by law, to bind the county by a contract. There is no such power in an architect, or a committee, unless it has been bestowed by the county board. We find no such power to have been given here. "The authorized body of a municipal corporation may, * * * by a *resolution or vote*, clothe its officers, agents or committees with power to act for it." (Dillon on Mun. Corp. sec. 450.) And see *Rice* v. *Plymouth County*, 43 Iowa, 136; *Bouton* v. *McDonough County*, 84 Ill. 384. The architect had authority, under the resolution, only to supervise the work it directed to be done,—not to order the doing of any other work. The architect's orders of October 27 and November 3 were for work which was outside of the terms of the resolution of July 30, and were not binding upon the

county. That resolution, at the most, only authorized work which was necessary "to inclose the building." These orders directed work to be done on the entire county half of the dome,—the four sides of the octagon,—the resolution having reference to no more than work on one side of it.

So far, then, as regards prospective profits on work not done, under an alleged contract with the county, we are to look to the resolution of July 30, to see what the contract was. The direction under that resolution was, to build a portion of the foundation of the dome. Under the evidence in the case we think the court was justified in finding that the word "foundation," as used in the resolution, meant the part below the ground. It is objected to this that both parties, by their conduct, gave the contract a different construction. The acts of the architect, and of the joint committee on public buildings and public service, were their individual acts, and are not to be regarded as the acts of the county board. The county board appear to have begun with a contract for the foundation. Subsequently, Sexton was ordered by the joint committee to fill in the wall up to the main water-table, or level of the first story floor. This order was not binding upon the county, but the work was done and paid for. This does not necessarily imply any more than that the work having been done for the county, it was willing to pay for the same. And so of the subsequent direction to complete the work as far as the roof line of the building, so far as payment was made for that work.

As the resolution uses the language, "as much of the foundation of the dome *as is necessary to inclose the building*," it is urged that the use of the italicized words shows an intention on the part of the county board to provide, by that resolution, for the closing up of the entire gap in the west wall of the building to the roof line. Defendant's view and explanation of that language is this: That the dome had not been determined upon when the resolution of July 30 was passed. It

was necessary that the city should coöperate with the county, in order that the dome should be built, and this the city had not done, and subsequently refused to do; that a very much heavier and more expensive wall was necessary if the dome was to be built than if it was not to be erected, and it would have been quite imprudent for the county, pending the settlement of the question as to whether there was to be any dome or not, to contract for the filling up the gap in the west wall to the roof line on the basis that the dome was to be built, and hence that the county board determined to contract for the work piecemeal, until the dome question was settled; that the foundation of the dome was octagonal, as was the dome itself, and only one of the eight sides of the foundation was determined to be built. The county board therefore directed Sexton to build one-eighth of the foundation, or so much of it as was necessary to render the inclosing of the building possible. This would seem to be a more reasonable interpretation of the meaning of the word "foundation," than that which the plaintiff urges. To inclose the building might have been, as argued by plaintiff's counsel, a prime object of the contract, and yet it not have been the purpose of this resolution to provide by it for closing up the entire gap in the west wall.

Some citations from works on architecture are made, with a view to show that the foundation of this dome extended to the spring of the arch or cupola. It may be admitted that a dome proper is an arched roof, but it does not follow that all below this arched roof is the foundation of the dome proper.

It is insisted that at least there was some evidence tending to show that the foundation of the dome extended to the roof line, and that therefore the court's ruling upon the instructions was wrong,—that the construction of the contract was a question of fact, dependent upon the intention of the parties and the condition of the building, and should have been submitted to the jury for its decision, and not have been de-

termined by the court. We do not find anything in the evidence in the case going to show that the foundation of the dome extended to the roof line. There seems to be nothing more in that respect than the unwarrantable inference which counsel would draw from the contract, the situation, and the acts and doings, which have been referred to, of the architect, and building committee, and defendant. We perceive no ambiguity with respect to the meaning of the term, "foundation," which should require submission to a jury to find such meaning, and take from the court its prerogative to interpret the meaning of a contract in writing.

It is admitted that the jury awarded to the plaintiff the full sum due for all work done.

Finding no error in the record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

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114 182
128 84
114 182
153 616
114 182
55a 473
114 182
63a 81
65a 531
66a 153
114 182
166 130
114 182
173 625
173 631
114 182
87a 398
114 182
90a 1568

ALANSON G. FREEMAN *et al.*

v.

THE OTTAWA BUILDING, HOMESTEAD AND SAVINGS ASSOCIATION.

Filed at Ottawa May 15, 1885.

1. BUILDING AND LOAN ASSOCIATION—*usury—validity of act of 1872.* The decision of this court in *Holmes et al.* v. *Smythe et al.* 100 Ill. 413, that the act for the incorporation of loan associations is not unconstitutional, and that loans made according to its provisions are not usurious, is adhered to and followed.

2. SAME—*forfeiture of stock for non-payment—notice.* Where the charter of a loan association authorizes the forfeiture of a member's stock for a failure to pay the prescribed assessments on his stock and the interest on a note given by him for money loaned him, together with the premium bid by him, the courts will not relieve him from a forfeiture for a willful neglect to make such payment; and a forfeiture may be declared in such case without notice to him, and the full amount due on his note collected.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of La Salle county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

MESSRS. BULL, STRAWN & RUGER, for the plaintiffs in error.

Mr. LORENZO LELAND, for the defendant in error.

Per CURIAM: This case differs, in principle, in no respect from *Holmes et al.* v. *Smythe et al.* 100 Ill. 413. We do not regard the questions decided there as now open to discussion, because, first, we can here only review the decision of the Appellate Court, and the validity of the statute authorizing the creation of corporations of the character of this defendant in error could not have been passed upon by that court; and second, *Holmes et al.* v. *Smythe et al.* was very carefully and thoroughly considered by this court. An opinion, on the first argument of the case, was filed, holding the statute unconstitutional and the transaction usurious. A rehearing was afterwards ordered, and the cause was then very elaborately argued, both orally and in printed briefs; and thereupon the opinion, as reported, was adopted and filed.

The fact that there Smythe was a stockholder before he obtained his loan, while here Freeman became a stockholder at the time he obtained his loan, we regard as of no consequence. When Freeman obtained his loan he was a stockholder, and since it is not pretended he was under such duress when he became a stockholder as would avoid his contract, he thenceforth was just as much a part of the corporation,—was just as effectually under the obligations of a stockholder to the corporation, and just as much entitled to the benefits to be derived from it,—as was the president of the company or any other stockholder; and inasmuch as he was bound by his contract to pay interest upon the amount he bid, and the monthly installments upon his shares of stock, until they

reached their par value, when they were to be accepted in payment of the loan, and he would be entitled to any excess after that payment, it follows that if, when he made his bid, several installments had already been paid upon his stock, he would only have had that much less to pay until his shares of stock reached their par value; but, in any event, the obligation is, to pay until that value is reached,—and, of course, whether the payments be some before and some after the bid for the money is made, or all after it is made, is immaterial. It may be, in *Holmes et al.* v. *Smythe et al.* we were in error in calling the transaction a sale of stock. The name is unimportant. The transaction there and here is precisely the same. The money in both cases was advanced to a stockholder, on his bid. The premium bid, as well as the interest and installments upon dues paid by the party obtaining the money, went to increase the value of his shares of stock, in common with the value of all the other shares of stock, and when the shares of stock reached their par value, the borrower was entitled to have his note canceled and his mortgage satisfied, and also to have paid to him any excess left after deducting the amount of his bid from the par value of his stock. It is an advancement of money in anticipation of the par value of his stock, or, if it be more agreeable to so call it, a loan to be paid by stock at its par value, with covenants to make such payments of interest and installments of dues on stock, etc., as shall eventually bring such shares to their par value.

The statute authorizes the declaration of forfeiture, and the default of the party being willful, and with full knowledge of the consequences, he was entitled to no notice. He had notice by the fact of his default. Having lost his rights as a stockholder, loss of money paid on that account follows as an incident.

The decree is affirmed.

Decree affirmed.

Syllabus.

MICHAEL GORMLEY

v.

JOHN L. DAY.

114 185
137 391
114 185
46a 130
114 185
57a 530
114 185
73a 128
114 185
81a 388
114 185
85a 97

Filed at Ottawa May 15, 1885.

1. MANDAMUS—*whether it will be awarded—where the ground of action has ceased to exist.* A court will not award a peremptory writ of *mandamus* when the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner.

2. So where an ordinance of a village vacating a street was repealed before it went into effect, but after the filing of a petition for a *madamus* to compel the village clerk to post copies of the same or give the relator copies thereof, the court will not award the writ, as to do so would subserve no beneficial purpose.

3. SAME—*whether action is premature.* Where a village clerk, by the charter of the village, is given thirty days after the passage of all ordinances within which to post up copies thereof, a proceeding by *mandamus*, commenced before the expiration of that time, to compel him to post an ordinance, must fail, the clerk not being in default when the suit was brought.

4. SAME—*of the petition.* And in such case, if the relator desires to rely on a standing resolution of the village council requiring the clerk to post notices and ordinances within five days after their passage, unless otherwise directed, he should set it up in his petition, and by proper averments negative the fact of his having been otherwise directed. A party can not make one case by his pleading and a different one by his proof, and recover.

5. ORDINANCE—*when it vests rights—right to repeal.* Where a village charter provides that ordinances shall not take effect until ten days after three copies thereof shall have been posted by the clerk, and that such posting shall be within thirty days after their adoption, no rights can be acquired under an ordinance vacating certain streets until such posting has taken place, and until ten days thereafter; and until this takes place, the ordinance may be repealed without depriving any one of any vested right.

6. JUDICIAL NOTICE—*of charter of village.* The courts will take judicial notice of the provisions of a special charter of a village in this State, when such charter is declared to be a public act.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. MORTON CULVER, for the plaintiff in error:

Section 6, article 4, of the village charter, gives the council power to vacate streets. See, also, Rev. Stat. 1874, chap. 145, sec. 1, and chap. 109, sec. 9.

The better rule is to require the clerk to perform his duty by posting an ordinance when passed, and if repealed, to post that also, leaving the courts to decide whether the repeal is valid. Dillon on Mun. Corp. (3d ed.) sec. 327.

So far as the clerk was concerned, it was his duty to the council to post the ordinance within five days after its passage. It was a rule of the council in prescribing the duties of the clerk. Dillon on Mun. Corp. (3d ed.) secs. 866, 867; *Chicago* v. *Sansum*, 87 Ill. 182; *Matthewson* v. *Cook County*, id. 590.

In order to put the ordinance in force it was necessary that it be posted as required by the charter. *Elizabethtown* v. *Lefler*, 23 Ill. 90; *Railroad Co.* v. *Engle*, 76 id. 317; *Barnett* v. *Newark*, 28 id. 62; Dillon on Mun. Corp. sec. 331.

It is probably true that the council might reconsider the ordinance, provided the rights of a third party had not intervened or vested or attached. Dillon on Mun. Corp. sec. 290; *State* v. *Hoyt*, 2 Ore. 246; *People* v. *Rochester*, 5 Lans. 11; *Reed* v. *Augusta*, 25 Ga. 386; *State* v. *Foster*, 2 Halst. 101; *Bigelow* v. *Hillman*, 37 Maine, 52; *Reiff* v. *Conner*, 10 Ark. 241; *Stoddard* v. *Gilman*, 22 Vt. 568; *New Orleans* v. *Wardens*, 11 La. 244; *State* v. *Miller*, 31 N. J. L. 521; *State* v. *Jersey City*, 27 id. 536; *Pond* v. *Negus*, 3 Mass. 230; *People* v. *Board of Supervisors*, 47 Ill. 256.

Gormley not having sold or incumbered the streets, upon the passage of the ordinance the fee to the lands in the streets reverted to him. *St. John* v. *Quitzow*, 72 Ill. 334.

At the first special meeting at which it was attempted, the councilmen were not notified as required by the by-laws of the council, and all acts were therefore void. Dillon on Mun. Corp. secs. 262-269.

The second special meeting was held after the beginning of this suit. At the first special meeting there were ayes 4, (including the president,) nays 1, and at the second special meeting there were ayes 3, nays 1, (the president not voting.) The council consists of five councilmen and one president.

The president is not an integral part of the council. Dillon on Mun. Corp. secs. 271, 272, 274.

The president has only a casting vote in case of a tie. See section 12, of article 2, of charter.

Under the statute already cited, it required the affirmative votes of at least four councilmen to vacate a street.

Messrs. McCOY, POPE & McCOY, for the defendant in error:

The party applying for a *mandamus* must show a clear legal right to have the thing sought by it done, and the thing sought to be coerced must be effectual as a remedy. *People* v. *Hatch*, 33 Ill. 9; *People* v. *Dubois*, id. 140; *People* v. *Forquer*, Breese, 104; *Commissioners* v. *People*, 66 Ill. 339; *People* v. *Village of Crotty*, 93 id. 187.

Mandamus will not lie when no benefit can accrue to the relator, nor will the writ command the performance of an official act or duty in advance of the time when it is actually required by law. High on Extraordinary Legal Remedies, secs. 10, 33, 96.

The ordinance of January 3, 1882, has not been posted, and it is conceded it has no effect till posted. Charter, article 7, sec. 3; *Newlon* v. *President*, 14 Ill. 364; *Elizabethtown* v. *Lefler*, 23 id. 90; *Railroad Co.* v. *Engle*, 76 id. 317; *Barnett* v. *Newark*, 28 id. 62; *Schott* v. *People*, 89 id. 195; Dillon on Mun. Corp. (3d ed.) sec. 331.

Moreover, till posted ten days, by its own terms such ordinance was not to go into effect.

Any right that Gormley may have had was but inchoate, at best, till after the posting of the ordinance of January 3, 1882.

An ordinance, it is well settled, has the effect of a statute. Dillon on Mun. Corp. (3d ed.) sec. 308.

By the repeal of a statute or ordinance before it is executed, and before any vested rights are acquired, the rights it gives fall with it, unless expressly saved. *Butler* v. *Palmer*, 1 Hill, 324; *Ray* v. *Goodwin*, 4 M. & P. 341; *Van Inwagen* v. *City*, 61 Ill. 34; *Wilson* v. *Railway Co.* 64 id. 542; Dwarris on Statutes, 676.

By the plat the title to the streets was vested in the village in trust for the use of the public. The action by the council was void as a breach of trust, and such attempted action could have been enjoined. *City of Alton* v. *Transportation Co.* 12 Ill. 38; *Carter* v. *Chicago*, 57 id. 283; *Jacksonville* v. *Railroad Co.* 67 id. 540; *Jackson* v. *Norris*, 72 id. 364; *Quincy* v. *Jones*, 76 id. 231; *Kreigh* v. *Chicago*, 86 id. 407.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This was a petition for a *mandamus*, brought by Michael Gormley, in the Superior Court of Cook county, against John L. Day, as clerk of the village of Glencoe, to compel him to post copies of an ordinance passed by said village on the third day of January, 1882, vacating certain streets and parts of streets in Gormley's addition to said village, and also to compel the said Day to give to petitioner a certified copy of said ordinance. Upon the hearing, the Superior Court refused the writ, and entered an order dismissing the petition, which was affirmed by the Appellate Court, whence the case is brought to this court.

The record shows that the lands or lots abutting on the streets and parts of streets embraced in the ordinance in question, including the streets and parts of streets themselves, formerly belonged to the petitioner, but that previous to the date of the ordinance he had conveyed the abutting property to others, who were chiefly interested in keeping

the streets open. The evidence also tends to show that the adoption of the ordinance was secured mainly through representations made by Gormley, which led the village council to suppose that he alone was interested in the abutting property, whereas, in truth, it belonged to one Clark, who would have been seriously damaged by the action of the council if the ordinance had been carried into effect.

Gormley seems to have proceeded upon the theory that as he had never disposed of the land occupied by the streets, upon the adoption of the ordinance vacating them he would at once have the right to appropriate it to his own use, however seriously it might injure the abutting owner. Be this as it may, it is clear the village council, shortly after passing the ordinance, became dissatisfied with its action, and thereupon called a special meeting of the council, to be holden on the 12th of the same month, for the purpose of reconsidering what had been done, at which meeting a resolution was adopted repealing the ordinance in question. Some doubt having been raised as to the sufficiency of the repealing resolution, or rather as to the regularity of the meeting and vote by which it was adopted, another meeting of the council was called on the 24th of the same month, when an additional repealing resolution was adopted, of the validity of which there can be no reasonable doubt. Such being the case, it is unnecessary to inquire whether the resolution of the 12th of January was valid or not, for as the ordinance was clearly repealed before the *mandamus* proceeding was brought to a hearing, it is just as fatal to the right of the petitioner as if the repealing resolution had been adopted before such proceeding was commenced. It is a well recognized principle that courts, in exercising their jurisdiction in *mandamus*, will not award the peremptory writ where the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substan-

tial or practical benefit to the petitioner. *Ray* v. *Goodwin*, 4 M. & P. 341; *The People* v. *Chicago and Alton Railroad Co.* 55 Ill. 95; *The People* v. *Cline*, 63 id. 394; *Cristman* v. *Peck*, 90 id. 150; *The People* v. *Lieb*, 85 id. 484; *The People* v. *Trustees of Schools*, 86 id. 613.

It is clear, that inasmuch as the ordinance was repealed before it went into effect, the posting or delivering of copies of it after its repeal would be an idle and fruitless ceremony of no possible benefit to the relator, something which the law never requires to be done.

Counsel for the relator seems to have proceeded upon the theory that upon the affirmative vote of the council adopting the ordinance, the relator thereby acquired certain vested interests in the streets sought to be vacated which he did not enjoy before in common with the public. This is an entire misapprehension. For the purposes of the argument it may be conceded if the ordinance had gone into effect before its repeal he would have acquired special rights under it, but as it did not, his rights remained precisely the same as if the vote of the council adopting it had never occurred. Before the so-called ordinance could have any legal effect, as such, two things, in addition to the affirmative vote adopting it, were necessary: First, printed or written copies of the ordinance had to be posted, within *thirty* days after its passage, in three of the most public places in the village; and second, the lapse of ten days after such posting. From its passage until the full period of ten days after posting had expired, it existed, so to speak, as an ordinance in embryo, merely. Until the final condition essential to give it effect as a law was performed, no rights, inchoate or otherwise, could arise under it, either to the relator or to any other person. See village charter, sec. 3,—Private acts, 1869.

The right of the village council to rescind or repeal the resolution adopting the ordinance, at any time before it took effect, is too clear to admit of discussion or doubt. The coun-

cil have exercised this right, and we have no disposition to interpose, even if we had the power to do so, which we clearly have not.

But outside of all these considerations, we are clearly of opinion the relator has wholly failed to make out a case against the respondent. By section 3 of the special charter under which the village of Glencoe is incorporated, just referred to, the clerk is given thirty days in which to post copies of ordinances, and this action was commenced on the 17th of January,—only fourteen days after the adoption of the ordinance. As the charter is declared a public act, we will take judicial notice of its provisions. It follows, therefore, the respondent was not in default at the time of the commencement of the suit, and hence the suit must fail. The only answer made to this position is, that there was a standing resolution of the village council requiring the clerk "to post notices and ordinances within five days of their passage, *unless otherwise directed.*" Waiving the question of the power of the council to change the time, as fixed by the charter, within which to post ordinances, it is sufficient to say that in order to overcome the presumption that the clerk performed his duty with respect to the posting of the ordinance, the relator should have set up this resolution in his petition, and by proper averments have negatived the hypothesis that the village council had in this particular instance otherwise directed. This he did not do. For aught that appears, the clerk may, in the language of the resolution, have been "otherwise directed," so far as this ordinance is concerned. Moreover, the petition on its face shows and charges that the "clerk is required to post three copies of all ordinances passed, *within thirty days after passage,*" while it contains no reference whatever to the resolution in question. This is but another instance of the many to be met with, of a party's making one case by his pleadings and another by his proofs. In such case the law does not permit a recovery.

In respect to the clerk's refusal to deliver a certified copy of the ordinance, we regard that as subordinate to his supposed rights under it, which we have already seen amounted to nothing, and under all the circumstances it does not appear that he wanted it for any proper purpose, but rather the contrary. Such being the case, this court, in the exercise of that legal discretion with which the law has clothed it in this class of cases, must withhold its assistance.

Finally, in any view to be taken of this case we have been unable to discover any merits in it.

The judgment will be affirmed.

Judgment affirmed.

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JOHN PARKER *et al.*

v.

JAMES S. SHANNON.

Filed at Ottawa May 15, 1885.

1. ALLEGATIONS AND DECREE *should correspond.* It is error to render a decree against the wife of the defendant, granting a perpetual injunction against her and her husband, where there is no allegation in the bill upon which to base any decree against her.

2. CHANCERY—*jurisdiction to try legal titles.* Where the defendant is in the possession of land, a court of equity will not take jurisdiction of a bill to try the legal title of the complainant to the same. A court of law is the proper forum for the trial of legal titles to land.

3. Where the main object of a bill in chancery is the recovery of possession from a judgment debtor, of lots which had been sold upon execution against him, and to have it found that title to the property was acquired under the execution sale, a court of equity will not be invested with jurisdiction to pass upon the legal title, merely from the fact that the bill also seeks to obtain an injunction to prevent the commission of waste or irreparable injury to the property. In such case the court should only stay, temporarily, the doing of any irreparable injury, until the further order of the court and a trial of the question of title in a court of law.

WRIT OF ERROR to the Circuit Court of Du Page county; the Hon. CHARLES KELLUM, Judge, presiding.

Mr. ROBERT HERVEY, for the plaintiffs in error:

The bill fails to show any ground for the interference of a court of equity. The bill shows that complainant is out of possession, and does not show the premises were vacant and unoccupied. A legal title is set up, upon which the law affords a complete and perfect remedy.

The decree is erroneous in granting a perpetual injunction, especially against Mrs. Parker, against whom no charge whatever is made in the bill.

In support of the foregoing points, reference is made to *Wing* v. *Sherrer*, 77 Ill. 200; *Victor Scale Co.* v. *Shurtleff*, 81 id. 313; *Hardin* v. *Jones*, 86 id. 313; *Wells* v. *Lammey*, 88 id. 174; *Whiting* v. *Stevens*, 97 id. 482; *Hacker* v. *Barton*, 84 id. 313.

Messrs. GARY, CODY & GARY, for the defendant in error:

If the decree is too broad, this court will, of course, modify it. The jurisdiction of courts of equity in such a case has been frequently declared. *Barm* v. *Bragg*, 70 Ill. 697; *Hart* v. *Mayor*, 3 Paige, 213; *Atchison* v. *Peterson*, 20 Wall. 515; *Lake Co.* v. *Worster*, 29 N. H. 413; *Sword* v. *Allen*, 25 Kan. 67; *Derry* v. *Ross*, 5 Col. 295; *Scudder* v. *Trenton*, 1 Saxt. (N. J.) 694; *Musselman* v. *Margins*, 1 Bush, 463; *Hopkins* v. *Caddick*, 18 L. T. 236.

The court having acquired jurisdiction of said cause for one purpose, very properly retained it for all purposes necessary to do complete justice between the parties, although it may have required matters to be passed on which, alone, would not be cognizable in a court of equity. *Pool* v. *Docker*, 92 Ill. 501; *Conklin* v. *Foster*, 57 id. 105; *Sherlock* v. *Village*, 59 id. 389; *Gage* v. *Parker*, 103 id. 534; *Haworth* v. *Taylor*, 108 id. 287.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The bill in chancery in this case, brought in the circuit court of Du Page county, by James S. Shannon, against John Parker, and Caroline M. B. Parker, his wife, sets forth that Shannon was the owner, and entitled to the exclusive possession, of four certain lots in the town of Hinsdale, in said county; that said John Parker was the former owner of the lots, and they were sold under execution upon a judgment against Parker, and no redemption having been made from the sale, that a sheriff's deed for the lots was duly executed to one Dunne, the purchaser at the execution sale, and that through *mesne* conveyances from and under Dunne, the title to the lots became vested in the complainant, subject to a possible right of dower in Parker's wife in two of the lots; that Parker and his wife conveyed, by deed, to one Munson, their right to two of the lots, subject to said execution sale, and that Munson afterward conveyed his interest in these two lots to the complainant; that in this mode the complainant derived his title to the four lots; that in consequence of his ownership, so derived, he is entitled to the possession of the lots, exclusively, and that no one else has any right to possession. The bill alleges that Parker claims to be the owner of or interested in the premises, claims that he has the right of possession, and has attempted to exercise acts of ownership, and has taken, or attempted to take, possession of the premises; that he has uprooted and broken down some of the shade-trees planted by complainant around and on the premises; that Parker is pecuniarily irresponsible, and the injuries about to be committed by him to the premises will be irreparable. The bill prays for an injunction, and that upon final hearing the complainant may be decreed to be the owner in fee simple of the premises, that the defendants be perpetually enjoined from going upon, interfering with or exercising any acts of ownership over the premises, and that a

writ of possession be awarded to the complainant. A temporary injunction was awarded. The defendants demurred to the bill. The court overruled the demurrer, and ordered the defendants to plead or answer instanter, and no plea or answer being filed, the defendants were defaulted, and the bill taken for confessed against them, and the court entered a decree finding that the complainant was the owner in fee simple of the premises, and that no other persons had any interest or right therein, and ordering that the complainant have exclusive possession and control of the premises, and perpetually enjoining the defendants from going upon, interfering with or exercising any acts of ownership over, or making any claim to, the premises.

It was evidently erroneous to make any decree against Caroline M. B. Parker, the wife of John Parker. There was no allegation in the bill upon which to found any decree against her. This proceeding would seem to be, in reality, an equitable suit of ejectment. The bill asks that the complainant be decreed to be the owner of the lands in fee simple, and that he have a writ of possession for the same. A court of equity is not the proper forum for the trial of legal titles to land. A court of law is the proper place of resort for such purpose. *Alton Marine and Fire Ins. Co.* v. *Buckmaster*, 13 Ill. 201; *Kennedy* v. *Northup*, 15 id. 153.

But it is said that a court of equity will entertain jurisdiction to prevent the commission, by one who is insolvent, of an irreparable injury to premises; that such was the purpose of the present bill, and that the court having acquired jurisdiction for that purpose, might properly retain it for all purposes necessary to do complete justice between the parties, and thus determine upon a matter which, alone, would not be cognizable in a court of equity. Although the latter be the general rule, we do not think it should apply in a case like the present, to subject the legal title to real estate to trial in a court of chancery. The prevention of the doing of an

irreparable injury to the premises appears here to be a rather subordinate purpose. The main object would seem to be the recovery of possession from a judgment debtor of property which had been sold upon execution against him, and to have it found that title to the property was acquired under the execution sale. By the decree entered, the proceeding was made to subserve all the purpose of an action of ejectment. We are of opinion the decree went too far in this respect,—that it should not have passed upon the legal title, but have left that to be determined upon in a court of law, and that it should not have gone further than to stay, temporarily, the doing of any irreparable injury, until the further order of the court, and a trial and determination, in a court of law, of the question of title.

The decree will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

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SAMUEL H. LARMINIE

v.

MARK CARLEY.

Filed at Ottawa May 15, 1885.

1. APPEAL—*reviewing facts—generally.* Where a judgment in favor of a plaintiff in an action of assumpsit is affirmed by the Appellate Court, and there is evidence in the record tending to establish the plaintiff's theory of the case, no assignment of error can be permitted which calls in question the finding of the facts by the trial and Appellate courts.

2. On the trial of a case by the court without a jury, the court decided to admit in evidence any letters, telegrams or communications from the defendant to his agent, provided they were shown to the plaintiff or the contents in any way communicated to him by the agent; but as to what letters or telegrams were shown the plaintiff, or their contents made known to him, the evidence was conflicting: *Held*, that the finding of the trial court as to what communications had been shown or made known to the plaintiff, was review-

able only by the Appellate Court, and that it would be presumed the trial court observed the rule of evidence it adopted.

3. SAME—*reviewing facts—on question of excessive damages.* Whether the amount of damages recovered by a plaintiff in an ordinary action *ex contractu* is excessive or not, is a question of fact, which this court can not consider on appeal from the judgment of the Appellate Court, affirming the judgment of the trial court.

4. EVIDENCE—*relevancy—in the particular case—as to communications between parties prior to the transaction in controversy.* In a suit against a commission man, to recover back margins put up from time to time on a purchase for future delivery, on the ground that the defendant closed out the deal contrary to the contract, there being no complaint that plaintiff had failed to advance the requisite margins prior to the day the deal was closed out, it was *held*, that proof of telegrams from the defendant to his agent prior to that day, and communicated to the plaintiff, was irrelevant, and that there was no error in refusing to admit the same.

5. Where a plaintiff's right of action depends upon the fact whether, on a particular day, he had failed to make a further advance to one who had made a purchase for him on the board of trade, on notice on that day, there being no claim of any default prior to such time, evidence consisting of communications from the defendant to his agent, by letters and telegrams, long prior thereto, is immaterial, and properly rejected.

6. SAME—*as to proof of conceded facts.* There is no error in refusing to admit evidence to prove any fact which is not disputed, but is conceded on the trial; nor is there any error in refusing to admit evidence which does not tend to prove the fact sought to be established by it.

7. AGENCY—*forfeiture of the agent's commissions and lien.* An agent employed to make a contract in his own name, for the purchase of grain, to be delivered at a future day, for his principal, and to whom his principal has advanced the required margins to protect him from loss, and who, after receiving all the margins required, closes out the deal and thereby sells at a loss, in violation of his contract, will lose his lien on the margins in his hands, and his commissions; and the principal may, under the common counts in assumpsit, recover of him all the margins so advanced by him to the agent.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. FRANCIS A. RIDDLE, and Mr. W. C. GOUDY, for the appellant.

Messrs. KING & PACKARD, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Although this case has been elaborately argued by counsel, it would seem it ought not to require any very extended discussion, as the controlling facts occurred in a single day, and are comprised in a brief compass. The action was commenced by Mark Carley, against Samuel H. Larminie and Edward A. Bigelow. Afterwards, it was discontinued as to the latter named defendant. The declaration contains only the common counts, to which the general issue was pleaded. The suit was brought to recover certain sums of money placed by plaintiff in the hands of defendant, as margins on deals in corn and lard, made on the board of trade in Chicago. It was stipulated, to be considered and used in evidence, that the declaration contains the whole cause of action claimed by plaintiff against defendant; that all the orders, contracts, purchases and sales made or attempted to be made in connection with the cause of action, or out of which or on account of which the alleged cause of action is claimed to have arisen, or which shall be offered or introduced in evidence, were *bona fide*, and for actual delivery of the articles therein mentioned, and that neither party shall call the same in question as having any element of gambling contracts in them. On the trial in the Superior Court, plaintiff recovered a judgment against defendant. That judgment was affirmed in the Appellate Court for the First District, and defendant brings the case to this court on his further appeal.

This court is asked to reverse the judgment of the Appellate Court on two different grounds: First, because the trial court improperly excluded certain documentary and other evidence offered by defendant, on the trial of the case; and second, because, assuming as true all that the evidence produced on the trial tends to prove in favor of plaintiff, it appears the damages awarded by the Superior Court are excessive. As respects the latter point, it may be said, as to the amount

which the evidence shows a plaintiff is entitled to recover in a particular case, that is regarded, under all the recent decisions of this court, as a question of fact, and as to which the finding of the Appellate Court is conclusive on this court. But as to the rule to be adopted for ascertaining the measure of damages, that is a question of law, and so far as the question made may have any application to the facts of the present case, it will be considered further on.

The objections taken to the rulings of the court in the exclusion of testimony offered by defendant, can be more understandingly considered after a brief reference to the principal and controlling facts of the case. In the fall of 1881 plaintiff procured defendant to buy for him a large quantity of corn, for delivery in May of the next succeeding year, and also a quantity of lard, for delivery, perhaps, in March, 1882. It was, no doubt, tacitly, if not expressly, understood the purchases of these commodities were to be made on the board of trade, and as plaintiff resided in Champaign, and defendant in Chicago, the negotiations between the parties were conducted through Mr. Newell, who was defendant's local agent at Champaign. Some dealings seem to have been had between the parties prior to the transactions out of which the present litigation arose, but as to them no controversy exists now, and never did. As to the quantity of corn and lard purchased by defendant for plaintiff, and as to the prices to be paid for them, and when the same were to be delivered, there never has been any disagreement between the parties, nor as to the commissions defendant should receive for his services in transacting the business. There is some controversy as to the precise amount of margins plaintiff was to keep on deposit with defendant, but none as to the fact plaintiff should keep a sufficient amount on deposit with defendant to afford him indemnity against loss for carrying the corn and lard for plaintiff. That was done, and up to the 14th or 15th day of February, 1882, it is not claimed plaintiff had not so far com-

plied with his contract in that respect that no complaint had been made, and no right of sale (which it is conceded defendant would have had in case of failure to keep margins good,) had been insisted upon, or even claimed. If there had been any failures on the part of plaintiff, previous to that date, to keep margins on deposit, they had been waived by accepting subsequent payments of margins, and continuing to carry the corn and lard, so that up to the 15th day of February, 1882, it can not be said there was really any breach of his contract, whatever it was, as to margins to be kept on deposit with defendant. Narrowing the controversy, then, as must be done, to what occurred on the 15th day of February, 1882, and the events connected directly therewith, the case is relieved of all seeming difficulty. On that day defendant sold plaintiff's corn and lard, and the principal contention is as to defendant's right, under his contract with plaintiff, to make such sales. It seems the markets had become unsettled on the board of trade, and defendant's position is, he caused his resident agent, Newell, to give plaintiff notice that unless he put up further margins by one o'clock P. M. on the 15th day of February, he would sell his corn and lard on the market, under his contract with plaintiff, or according to the usual custom in such cases. Plaintiff denies he had any notice whatever that his deals were to be closed out, and asserts that when he was asked to do so on that day, he put up all the margins demanded. There is evidence that on the morning of the 15th of February, Newell notified plaintiff of the unsettled condition of the markets, and that he was calling for margins. In reply, plaintiff told Newell his margins were not "exhausted," and further stated he had been figuring, and that Newell looked over, and said to him: "For the time being, your margins are sufficient. If there is a change in the market—if it is lower—I will call on you." Plaintiff then left Newell's office and went to his home. In the afternoon of the same day, perhaps about two o'clock, Newell went to

plaintiff's house, and told him "the market was panicky—the bottom was about falling out," and that if he wanted to save his margins, he must put up more money. Plaintiff then gave Newell his check for $2000, and took his receipt for it for so much money paid to defendant, as margins, to secure his deals. Thereupon Newell, it is said, telegraphed defendant that plaintiff "had margined handsomely." Later in the same day, perhaps about dark, Newell again went to plaintiff, and told him he had just received a telegram from defendant that his deals had been closed out. There is a conflict in the evidence as to some of the facts occurring on the day the deals were closed, but as there is evidence tending to establish plaintiff's theory of the case, it will be understood the trial and Appellate courts found the facts that way, and no assignment of error can be permitted that will call in question the correctness of that finding. Upon the facts as they must have been found by the lower courts, as the evidence tends to establish them, it is clear plaintiff had no notice his deals were to be closed out on that day, or at any other time; that he was not in default as to margins, for, in the language of defendant's agent, he had "margined handsomely," and that defendant had no right, either under his contract with plaintiff, or under any custom proven to have existed on the board of trade, or elsewhere, in regard to such matters, to close out his deals. Keeping these facts in mind, the reason for rejecting most, if not all, of the testimony offered by defendant, of which complaint is made, is apparent. Most of the evidence rejected consisted of communications, by letters and telegrams, that had passed between defendant and his agent, Newell, and which related to matters long passed, and concerning which no controversy ever existed. The decision of the trial court might be sustained on the single ground the evidence offered was immaterial on the issue to be tried. It related to no matter in dispute between the parties, and could not, therefore, illustrate any phase of the case. What pos-

sible effect could it have on the issue joined, to prove what communications had passed between the parties concerning margins, prior to the 15th day of February? No complaint is now or ever was made that prior to that date plaintiff had been in default in regard to putting up margins on the deals closed out on that day. Whether plaintiff was in default as to margins on the day the deals were closed, was the only question then before the court, and what communications may have taken place in relation to other deals at any former time, were wholly irrelevant. The evidence tendered would obscure, rather than enlighten, the issue to be tried, had it been admitted.

But there is another view that may be taken, that leads to the same conclusion. It will be remembered the case was tried before the court, without the intervention of a jury. The court decided, in regard to all this class of testimony: "Any letters, telegrams or other communications between defendant and Ellis J. Newell, were competent and proper evidence to be introduced on the part of defendant, provided that any such letter, telegram or other communication was shown to, or the contents in any way communicated to, the plaintiff." It is not made a matter of objection that this ruling was not as broad as the law would warrant, but the complaint is, the court repeatedly violated the rule announced, in its subsequent rulings. If the court departed from the rule it had declared, it must have been in excluding letters or telegrams that had been shown to, or the contents communicated to, plaintiff. How could it be known to this court whether a letter or telegram that had been shown to, or the contents disclosed to, plaintiff, was rejected when offered in evidence? Obviously, what letters or telegrams had been shown to plaintiff, or the contents communicated to him, could only be known from the evidence, and as to them the evidence was quite as conflicting as to any other point in the case. It was the privilege of the trial court to determine, from the evidence, conflicting as it

was, what communications had been shown to, or the contents made known to, plaintiff, and its decisions as to such controverted facts are only reviewable in the Appellate Court. It can not, therefore, be known to this court that the trial court rejected any communication, whether by letter or telegram, that may have passed between defendant and Newell, that the proof showed had been exhibited to plaintiff, or the contents disclosed to him. To ascertain that fact would require this court to determine controverted questions of fact, which is not allowable. The court decided it would admit any letter, telegram or other communication between defendant and his agent, Newell, that had been shown to, or the contents communicated to, plaintiff, and the presumption will be indulged it observed the rule of evidence adopted, and admitted everything it believed, from the evidence, had been so proven.

It is said the correspondence between defendant and Newell, if admitted, would go far to confirm Newell's testimony that he had made the calls for margins, as directed, as was his duty to do. How the testimony offered could have any such effect, is not readily understood. As before remarked, there was no controversy as to what Newell did, as agent for defendant, in making calls for margins *prior* to the 15th day of February, and it would seem to be absurd to contend that letters or telegrams sent by defendant weeks or months before, could, in the remotest degree, tend to prove that Newell on that day performed a duty devolved on him by his relations with defendant. The presumption the agent did his duty to his principal is just as strong without such testimony as with it.

Coming now to consider testimony offered relating more nearly to events that transpired on the 15th day of February, no error is perceived in the rulings of the court in the rejection of testimony. It is proven that on the 14th and 15th days of February, defendant sent from Chicago, to Newell, one letter and a number of telegrams,—perhaps three, in all,

—directing Newell to call on plaintiff for further margins. These papers, it is said, were offered, in connection with Newell's evidence, to prove that Newell made calls on plaintiff for margins, on the 14th and 15th days of February, by direction of defendant, and that plaintiff neglected to margin as required, and therefore his deals were lawfully closed for want of reasonable margins. If the letter and the telegrams were offered with a view to show Newell had authority from defendant to make calls for margins, that was wholly unnecessary, as it was a conceded fact Newell had such authority; but if done to show Newell actually made such calls, then it is sufficient to say the evidence tended to prove no such thing,—so that in either view the evidence was unimportant. But aside from this view, it is clear that every one of these papers that was at all material to the matter in issue between the parties was in fact admitted in evidence. The letter was read in evidence, and the telegram of the morning of the 15th was lost, but Newell was permitted to state his version of its contents, and that was all that defendant could reasonably insist upon. Had the other telegrams of near that date been given in evidence, they would have proved nothing material to the defence not contained in the letter and telegram actually read in evidence, and it would have been useless to incumber the record with so many repetitions of the same thing. These telegrams are preserved in the transcript of the record, and it is seen they only contain statements as to the unsettled condition of the market, and that Newell was required to call for margins. All that was in the letter and telegram in evidence, and nothing more was required.

Objections taken to the rulings of the court in the rejection of other testimony have so little in their support it is not deemed necessary to remark upon all of them, and to do so would extend this opinion to a most unreasonable length. It is sufficient to say they have all been considered, and it is found none of them are tenable.

Although the court was not asked, by any written proposition to be held as law, to state what rule would be adopted to ascertain the measure of damages, it is quite evident the court determined plaintiff was entitled to recover the whole amount of margins deposited with defendant, and that, it is said, was error of law. The question made on this branch of the case is not new in this court. In *Jones* v. *Marks*, 40 Ill. 313, it was held that where a party making the purchases of grain or other commodities, disobeyed instructions in making sales, he thereby lost all lien upon the money deposited with him as a pledge against loss, and as the depositor was thereby released from the contract, he became entitled to withdraw the money from the hands of the depositary, and could maintain an action for its recovery. Since then the principle of that case has been recognized and followed so often it may now be regarded as the settled law, in this State, at least, whatever it may be elsewhere. (*Oldershaw* v. *Knowles*, 101 Ill. 107; *Denton* v. *Jackson*, 106 id. 433.) These cases are, of course, conclusive of the same point in the case now before the court.

It was also held in *Jones* v. *Marks*, *supra*, the money in the hands of the depositary, in such cases, might be recovered back by the depositor, under the common counts, in an action of assumpsit, and that it was not necessary to declare on the special contract which had been violated, as nothing remained to be done under it. That is precisely the case here. The money was recovered under the common counts, in an action of assumpsit, and that is permissible under the previous decisions of this court.

There is no pretence the deals were replaced by defendant, either with or without the direction of plaintiff, and for that reason the rulings on this branch of the case, whether strictly correct or not, do not affect the merits of the case one way or the other. As the case was presented in the trial court, that was an immaterial issue. Had defendant replaced the deals

when it was discovered they had been irregularly closed out, or had defendant offered to do so without unreasonable delay, and without additional expense to plaintiff, and the offer had been refused, then some of the questions made might have become important, otherwise not.

There is no error in the record that in any substantial degree affects the merits of the case, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

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THOMAS MARTIN *et al.*

v.

JOSEPH FOULKE *et al.*

Filed at Ottawa May 15, 1885.

1. EXCEPTIONS AND BILLS OF EXCEPTIONS—*necessity of taking and preserving exceptions.* The rule in this State is inflexible that in order to take advantage of any improper ruling of the court, pending the trial of a cause, which does not relate to the pleadings or appear on the face of the judgment itself, the bill of exceptions must show an exception was taken to the same. It is not sufficient that the clerk recites in the record that exception was taken. Joinder in error and submitting the cause are not a waiver of defect in this respect.

2. Where a cause is tried by the court without a jury, and no exception is taken to the finding of the court or to the rendering of judgment, and preserved in a bill of exceptions, and no motion is made for a new trial, the finding and judgment can not be assigned for error.

APPEAL from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. THOMAS H. HUTCHINS, for the appellants.

Messrs. GARNSEY & KNOX, for the appellees.

Opinion of the Court.

114 206
200 [1]290
200 [2]291
103a [2] 76
114 206
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109a [2]167
114 206
208 [1]622

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is an appeal from a judgment rendered by the circuit court of Will county, in an action of ejectment, wherein the appellees were plaintiffs and the appellants defendants. The declaration consists of but one count, in the usual form, alleging that the plaintiffs claim the premises in fee, but specifies no particular interest in any of them. By consent of parties the cause was tried by the court without a jury, resulting in a finding and judgment for plaintiffs. The judgment followed the declaration in finding that the premises belonged to appellees in fee.

The errors assigned are as follows: First, the court erred in rendering judgment for the plaintiffs, and against the defendants; second, that the judgment does not specify the particular estate of each plaintiff in the premises, according to the proof, and is therefore void; third, that the proof does not show title in the plaintiffs, or either of them, and therefore the judgment is void; fourth, that the proof does not warrant such a judgment in favor of the plaintiffs.

In the view we take of this case it is unnecessary to inquire whether any of the above errors are well assigned or not, for an examination of the record shows that no exception was taken to the findings of the court or to the rendering of the judgment, and that not even a motion for a new trial was made. It is true there is a recital inserted by the clerk in the record, immediately following the judgment, to the effect that such an exception was taken, but we can not regard that statement as a part of the record. If such an exception was taken, it could only have been made a part of the record by embodying it in the bill of exceptions, and we fail to find it there. The rule is inflexible that in order to take advantage of any improper ruling of the court, pending the trial of a cause, which does not relate to the pleadings or appear on the face of the judgment itself, must, in order to take advan-

tage of it in an appellate tribunal, be preserved by a proper bill of exceptions. That was not done in this case, and hence the appellants will be deemed to have waived the error complained of. To this view of the matter it is answered, that appellees, by joining in error, went to trial on the merits, and thereby waived the defect in the bill of exceptions,—and in support of this claim *Brockway* v. *Rowley*, 66 Ill. 102, is cited. We do not deem it necessary to stop to consider the case just cited, for, conceding it to be an authority in point, which we do not, we could not consistently follow it. The position of appellants, as we understand it, is this: that if the court, upon the trial of a cause, makes an improper ruling against a party, to which no exception is taken, he may, nevertheless, on appeal, assign for error the improper ruling; and if the opposite party joins in error, the only inquiry then will be, whether, as matter of fact, the error occurred, and if it did, the complaining party may avail himself of it precisely in the same way, and to the same extent, as if the proper exception had been taken. Whatever may be the rule in this respect elsewhere, it certainly can not be the law here. The Reports of this State abound with instances of erroneous rulings by trial courts which this court has uniformly refused to consider on the ground no exceptions were taken to them, in all of which, except, perhaps, in a case now and then omitted through inadvertence, there was a joinder in error. *Miere* v. *Brush*, 3 Scam. 21; *Armstrong* v. *Mock*, 17 Ill. 166; *Gridley* v. *Capen*, 72 id. 11; *Hill* v. *Harding*, 93 id. 77. This practice is of too long standing, and the rule too firmly established, to admit of change now.

The only error complained of being such as we can not consider, the judgment must be affirmed.

Judgment affirmed.

Syllabus.

ROSEHILL CEMETERY COMPANY

v.

MARY HOPKINSON, EXR'X.

Filed at Ottawa May 15, 1885.

1. CEMETERY COMPANIES—*corporate powers—to make by-laws, rules and regulations—uniformity of application required.* Where the charter incorporating a cemetery company provides for a board of managers, who are authorized to lay off the grounds into lots, sell the same, make by-laws, and such rules and regulations for the government of lot owners and visitors as they may deem necessary, they may make such rules and regulations; but they must be reasonable, equal in their operation, and uniform in their application to all owners of lots in the cemetery. The managers will have no right to make a rule which will confer a right upon one owner in regard to the improvement of his lot, and deny the same right to another lot owner.

2. Such a company being a *quasi* public corporation, and possessed of the right to condemn property, and invested with other important powers, is bound to exercise its rights and privileges fairly and impartially; and if, through its officers, it attempts to act arbitrarily, or to transcend its powers to the injury of a lot owner, such action may be reviewed and controlled by the courts.

3. SAME—*erecting a vault upon a cemetery lot—rights of the owner—of rules in restriction thereof.* If the board of managers of a public cemetery company incorporated by law, have authority, under their charter, to prevent a lot owner from erecting a vault upon his lot, that power can only be exercised by the adoption of a general rule on the subject applicable to every one.

4. A rule adopted by the board of managers of an incorporated cemetery company, that "no vault shall be built entirely or partially above ground without permission of the company," taken in connection with another that no vault shall be constructed in the cemetery until the designs and specifications of the same, with a diagram of location, shall have been submitted and approved by the board, can not be regarded as prohibiting the erection of a vault; and in the absence of a rule prohibiting such erection as to all persons, the board of managers have no power to establish a rule governing a particular case.

5. In this case the company had no rule prohibiting the erection of vaults within the cemetery, but was acting under a rule requiring designs, specifications and a diagram to be submitted. This was fully complied with by the owner, who proposed to erect a vault upon his lot, and no objection was made as to the design and specifications, and the question of granting leave to erect

the vault was left to the decision of the landscape gardener, who decided to grant the permission, and the owner then made a contract for the building of the vault, and the contractor proceeded with the work until prevented by the officers and agents of the company. It also appeared that many vaults had been allowed to be built in the cemetery: *Held*, that the court properly granted a decree, at the instance of the lot owner, enjoining the company from interfering with the work or preventing the erection of the vault.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. BENTLEY & BENTLEY, for the appellant:

The right of complainant to build a vault upon her lots in the cemetery of the defendant company, the company objecting thereto, depends primarily upon her title to the lots. Every deed of conveyance, whether for a pew, or vault, or house, is a contract between the parties, to be interpreted according to its actual, or fairly to be presumed, intent. *Richards* v. *Protestant Dutch Church*, 32 Barb. 45.

A deed of conveyance of a cemetery lot, though absolute in terms, conveys no right, *per se*, to build a vault upon it. The title to cemetery lots is analogous to that of pew-holders in a house of worship, which is subject to the right of the corporation owning the house to make such rules and regulations governing the pew-holders, generally, as it may see fit. *Buffalo Cemetery* v. *City of Buffalo*, 46 N. Y. 503; *Voorhees* v. *Presbyterian Church*, 8 Barb. 135; *Cooper* v. *First Presbyterian Church*, 32 id. 222; *Richards* v. *Protestant Dutch Church*, 32 id. 45; *Kincaid's case*, 66 Pa. St. 411; *Gay* v. *Baker*, 17 Mass. 435; *Daniel* v. *Wood*, 1 Pick. 102; *Sohier* v. *Trinity Church*, 109 Mass. 1; *Mt. Moriah Cemetery* v. *Commonwealth*, 81 Pa. St. 235.

Where there is no reasonable presumption of authority, and no actual authority given to an agent, the corporation should not be prejudiced by his unauthorized acts. *Castar* v. *Titusville Gas Co.* 63 Pa. St. 38; *Bank of United States* v.

Dun, 6 Pet. 51; *Bank of Metropolis* v. *Jones*, 8 id. 12; *Stewart* v. *Huntington*, 11 S. & R. 267.

The affairs of a corporate body can be transacted only at a corporate meeting. *Schumm* v. *Seymour*, 24 N. J. Eq. 153; *Cammemeyer* v. *Lutheran Church*, 2 Sandf. Ch. 254; *Dennison* v. *Austin*, 15 Wis. 334.

If the agreement is made outside of the meeting, it is not good. *Railroad Co.* v. *Reeve*, 15 Md. 240.

Mr. J. BLACKBURN JONES, and Mr. ROBERT H. MCMURDY, for the appellee:

The cemetery company, being a *quasi* public corporation, must exercise its powers fairly, reasonably and impartially. *Village of Glencoe* v. *People*, 78 Ill. 389; *Zanone* v. *Mound City*, 103 id. 566; *Chicago* v. *Rumpff*, 45 id. 97; *Trustees* v. *Walsh*, 57 id. 366; *Railroad Co.* v. *People ex rel.* 67 id. 14; *Richards* v. *Protestant Dutch Church*, 32 Barb. 44; *Vincent* v. *Railroad Co.* 49 Ill. 33; *Happy* v. *Morton*, 33 id. 40; Tapping on Mandamus, (Am. ed.) 66; *Green* v. *Green*, 34 Ill. 320.

The doctrine of all the foregoing cases is, that where a discretion is abused, and works injustice, it is admissible that it shall be controlled by *mandamus*.

The deed for these lots conveyed the title, subject only to reasonable rules and regulations of the company. *Commonwealth* v. *Mt. Moriah Cemetery*, 10 Phil. 385.

The presumption is, that acts which an officer of a corporation usually and customarily performs in behalf of his company, are authorized by the directors. *Elwell* v. *Dodge*, 33 Barb. 339; *Beers* v. *Phœnix Glass Co.* 14 id. 368; *Flickner* v. *Bank of United States*, 8 Wheat. 338; *Smith* v. *Hull Glass Co.* 9 Eng. L. & Eq. 446; *Bissell* v. *Railroad Co.* 22 N. Y. 259; Story on Agency, (7th ed.) sec. 52; Green's Brice's Ultra Vires, 506, note a; *Commercial* v. *Union*, 19 Horr. 318; *Flagely* v. *Hubbard*, 22 Cal. 35; Potter on Corp. sec. 131, page 183.

It is also presumed that directors are acting lawfully in what they do. *Knox* v. *Aspinwall*, 21 How. 539; *Zabriskie* v. *Clearland*, 33 id. 381; *De Voss* v. *Richmond*, 18 Gratt. 338.

Corporations are bound by the acts of their agents within the scope of the agents' authority. Angell & Ames on Corp. sec. 297; *Bissell* v. *Railroad Co.* 22 N. Y. 300; *State* v. *Commercial*, 8 S. & M. 233.

Directors of a corporation are themselves its agents. Potter on Corp. sec. 131; Field on Corp. sec. 173; Angell & Ames on Corp. sec. 299.

The owner of a lot in a church close has merely a usufructuary interest. The church or society, by a mere majority vote, may change the burial ground from one place to another, or may discontinue it altogether; but the owner of a lot who acquired by deed from a private corporation, holds the fee simple, subject only to the rules of the company. *Commonwealth* v. *Mt. Moriah Cemetery*, 10 Phil. 387; *Richards* v. *Protestant Dutch Church*, 32 Barb. 44; *Matter of Reformed Church*, 7 How. 478.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

Mary Hopkinson, executrix of the estate of her deceased husband, Charles Hopkinson, was proceeding to erect a vault on lots 135 and 136, in section "D," in Rosehill cemetery, which had been purchased by her husband on the 5th day of September, 1863, when she was prevented by the officers and agents of Rosehill Cemetery Company. Being unable to proceed with the work, she filed her bill of complaint in the Superior Court of Cook county, in which she prayed for an injunction restraining the Rosehill Cemetery Company and its agents and officers from interfering with or hindering complainant and her employes in the erection of the vault upon her said lots, and from injuring or interfering with it after it shall have been erected. The defendant put in an answer to

the bill, and upon the hearing, on the pleadings and the evidence, the court rendered a decree as prayed for in the bill, which was affirmed in the Appellate Court.

The appellant was incorporated under an act entitled "An act to incorporate the Rosehill Cemetery Company," approved February 11, 1859. Afterwards, and on February 13, 1863, the legislature amended the act, and under the original and amended acts the company has, since its incorporation, transacted business in Cook county. Under the power contained in the act the company purchased land, laid out the cemetery, and sold lots for burial purposes. The act of incorporation provides for a board of managers, who are authorized to lay off the grounds into lots, sell the same, make by-laws, and make such rules and regulations for the government of the lot-holders and visitors to the cemetery as they may deem necessary. Among the rules adopted by the company was the following: "No vault or tomb shall be constructed in the cemetery until the designs of the same accompanying the specifications, and a diagram of location, shall have been submitted to the board of managers, and approved by them."

The deed conveying the property to Hopkinson contained the following provision: "Subject, however, to the provisions and restrictions of an act of the General Assembly of the State of Illinois, entitled 'An act to incorporate the Rosehill Cemetery Company, approved February 11, 1859,' (and all amendments that may hereafter be made thereto.) And also subject to the conditions and limitations, and with the privileges and restrictions, specified in the rules and regulations hereto annexed, and which are made a part of the conveyance, or which the said company may hereafter make in accordance with said act, or with any amendment which may hereafter be made thereto."

One of the rules annexed to the deed was as follows: "The proprietor of each lot shall have the right to erect any proper stone or monument or sepulchral structures thereon, except

—directing Newell to call on plaintiff for further margins. These papers, it is said, were offered, in connection with Newell's evidence, to prove that Newell made calls on plaintiff for margins, on the 14th and 15th days of February, by direction of defendant, and that plaintiff neglected to margin as required, and therefore his deals were lawfully closed for want of reasonable margins. If the letter and the telegrams were offered with a view to show Newell had authority from defendant to make calls for margins, that was wholly unnecessary, as it was a conceded fact Newell had such authority; but if done to show Newell actually made such calls, then it is sufficient to say the evidence tended to prove no such thing,—so that in either view the evidence was unimportant. But aside from this view, it is clear that every one of these papers that was at all material to the matter in issue between the parties was in fact admitted in evidence. The letter was read in evidence, and the telegram of the morning of the 15th was lost, but Newell was permitted to state his version of its contents, and that was all that defendant could reasonably insist upon. Had the other telegrams of near that date been given in evidence, they would have proved nothing material to the defence not contained in the letter and telegram actually read in evidence, and it would have been useless to incumber the record with so many repetitions of the same thing. These telegrams are preserved in the transcript of the record, and it is seen they only contain statements as to the unsettled condition of the market, and that Newell was required to call for margins. All that was in the letter and telegram in evidence, and nothing more was required.

Objections taken to the rulings of the court in the rejection of other testimony have so little in their support it is not deemed necessary to remark upon all of them, and to do so would extend this opinion to a most unreasonable length. It is sufficient to say they have all been considered, and it is found none of them are tenable.

Although the court was not asked, by any written proposition to be held as law, to state what rule would be adopted to ascertain the measure of damages, it is quite evident the court determined plaintiff was entitled to recover the whole amount of margins deposited with defendant, and that, it is said, was error of law. The question made on this branch of the case is not new in this court. In *Jones* v. *Marks*, 40 Ill. 313, it was held that where a party making the purchases of grain or other commodities, disobeyed instructions in making sales, he thereby lost all lien upon the money deposited with him as a pledge against loss, and as the depositor was thereby released from the contract, he became entitled to withdraw the money from the hands of the depositary, and could maintain an action for its recovery. Since then the principle of that case has been recognized and followed so often it may now be regarded as the settled law, in this State, at least, whatever it may be elsewhere. (*Oldershaw* v. *Knowles*, 101 Ill. 107; *Denton* v. *Jackson*, 106 id. 433.) These cases are, of course, conclusive of the same point in the case now before the court.

It was also held in *Jones* v. *Marks*, *supra*, the money in the hands of the depositary, in such cases, might be recovered back by the depositor, under the common counts, in an action of assumpsit, and that it was not necessary to declare on the special contract which had been violated, as nothing remained to be done under it. That is precisely the case here. The money was recovered under the common counts, in an action of assumpsit, and that is permissible under the previous decisions of this court.

There is no pretence the deals were replaced by defendant, either with or without the direction of plaintiff, and for that reason the rulings on this branch of the case, whether strictly correct or not, do not affect the merits of the case one way or the other. As the case was presented in the trial court, that was an immaterial issue. Had defendant replaced the deals

when it was discovered they had been irregularly closed out, or had defendant offered to do so without unreasonable delay, and without additional expense to plaintiff, and the offer had been refused, then some of the questions made might have become important, otherwise not.

There is no error in the record that in any substantial degree affects the merits of the case, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

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60a 617
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68a 602
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168 85
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170 436
71a 321
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81a 413
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THOMAS MARTIN *et al.*

v.

JOSEPH FOULKE *et al.*

Filed at Ottawa May 15, 1885.

1. EXCEPTIONS AND BILLS OF EXCEPTIONS—*necessity of taking and preserving exceptions.* The rule in this State is inflexible that in order to take advantage of any improper ruling of the court, pending the trial of a cause, which does not relate to the pleadings or appear on the face of the judgment itself, the bill of exceptions must show an exception was taken to the same. It is not sufficient that the clerk recites in the record that exception was taken. Joinder in error and submitting the cause are not a waiver of defect in this respect.

2. Where a cause is tried by the court without a jury, and no exception is taken to the finding of the court or to the rendering of judgment, and preserved in a bill of exceptions, and no motion is made for a new trial, the finding and judgment can not be assigned for error.

APPEAL from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Mr. THOMAS H. HUTCHINS, for the appellants.

Messrs. GARNSEY & KNOX, for the appellees.

Opinion of the Court.

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Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is an appeal from a judgment rendered by the circuit court of Will county, in an action of ejectment, wherein the appellees were plaintiffs and the appellants defendants. The declaration consists of but one count, in the usual form, alleging that the plaintiffs claim the premises in fee, but specifies no particular interest in any of them. By consent of parties the cause was tried by the court without a jury, resulting in a finding and judgment for plaintiffs. The judgment followed the declaration in finding that the premises belonged to appellees in fee.

The errors assigned are as follows: First, the court erred in rendering judgment for the plaintiffs, and against the defendants; second, that the judgment does not specify the particular estate of each plaintiff in the premises, according to the proof, and is therefore void; third, that the proof does not show title in the plaintiffs, or either of them, and therefore the judgment is void; fourth, that the proof does not warrant such a judgment in favor of the plaintiffs.

In the view we take of this case it is unnecessary to inquire whether any of the above errors are well assigned or not, for an examination of the record shows that no exception was taken to the findings of the court or to the rendering of the judgment, and that not even a motion for a new trial was made. It is true there is a recital inserted by the clerk in the record, immediately following the judgment, to the effect that such an exception was taken, but we can not regard that statement as a part of the record. If such an exception was taken, it could only have been made a part of the record by embodying it in the bill of exceptions, and we fail to find it there. The rule is inflexible that in order to take advantage of any improper ruling of the court, pending the trial of a cause, which does not relate to the pleadings or appear on the face of the judgment itself, must, in order to take advan-

APPEAL from the County Court of Knox county; the Hon. DENNIS CLARK, Judge, presiding.

Mr. FLETCHER CARNEY, and Mr. G. W. THOMPSON, for the appellant.

Messrs. WILLOUGHBY & DAUGHERTY, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On May 5, 1884, the city council of Galesburg passed an ordinance providing for the construction of a sewer in one of its streets, the cost thereof to be paid, one-half by general tax, and one-half by special taxation, to be levied on the property contiguous to the improvement, in proportion to the benefits accruing to the respective parcels of land or lots along the line of the improvement by the making thereof, and to be levied and collected as provided by article 9 of an act of the General Assembly of the State of Illinois, entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872. The street committee were appointed a committee to estimate the cost of the improvement. The committee subsequently made their report, giving the amount of the total cost of the work, and thereupon the city council, by resolution, ordered the city attorney to file a petition in the county court to levy such tax, pursuant to law. The city attorney then filed the petition in this case, in the county court, praying for the appointment of three commissioners to levy the special tax for one-half of the cost of the improvement, on property contiguous thereto, as provided by law, and in conformity with the ordinance. The court, upon hearing the petition, ordered that the prayer thereof be granted, and appointed commissioners to visit the locality, and to levy one-half the cost of the improvement upon contiguous property, in proportion to the benefits accruing to the property from the making of the improvement. The commissioners made the assessment, assessing one-half of the estimated cost of the improvement

on the contiguous property, and returned the assessment roll into court. Objections on the part of several of the property owners, to the petition and the report of the commissioners, were filed. On the argument of the objections, the court dismissed the petition without hearing any evidence, and denied the motion of the petitioner for a default and confirmation of the assessment as to the non-objecting parties, and the petitioner excepted, and appealed to this court.

The first objection which is urged to the sufficiency of the petition is, that it should have shown that before the city council passed the ordinance directing that one-half the cost of the proposed improvement should be borne by contiguous property, there should have been an examination, and determination of the probable benefits to such property, of the work. The constitutional provision in regard to the right to make local improvements by city and village authorities, is: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise." (Art. 9, sec. 9.) The statute provisions are: "The corporate authorities of cities and villages are hereby vested with power to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe." "When any such city or village shall, by ordinance, provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment or by special taxation of contiguous property, or general taxation, or both." (Rev. Stat. 1874, secs. 116, 117.) Here is ample power given for the making of local improvements. The one in question might have been made wholly by special taxation.

The notion seems to be advanced by counsel that special taxation implies the idea of special benefit, and that there

can be no special taxation of property unless, and according as, it may be specially benefited. There is no countenance for this. The power of special taxation is given unqualifiedly, with no restriction whatever as to the benefiting contiguous property. The supposition that contiguous property would be benefited by a local improvement, may have operated with those who granted the power of special taxation of such property, in the granting of the power, but they left the exercise of the power without condition in this respect. Instead, then, as they might, of imposing the whole cost of this improvement upon contiguous property, the city council imposed upon it but one-half of the cost, and there was no requirement that beforehand, or at any other time, there should have been any express determination that the property would be benefited to that extent, or at all. Having determined to raise only one-half the cost of the improvement by special taxation of contiguous property, it was open to the city council to adopt which one of the various modes of special taxation of the property they saw fit,—whether according to frontage of the property, value, benefits received, or otherwise. They resorted to the one of benefits received from the improvement, which would seem to be a most just and equitable mode.

On this subject of special taxation for local improvements, this court, in *White* v. *The People ex rel.* 94 Ill. 604, said: "This proceeding is in the taxation of contiguous property; and in the adoption of that mode there is no requirement of benefits received, and no respect thereto further than may be had by the city council in determining upon which particular one of the several modes of special taxation of contiguous property open to them, shall be resorted to," etc. See *Enos et al.* v. *City of Springfield*, 113 Ill. 65.

Another objection made is, that the committee appointed to make the estimate of the cost of the proposed improvement were appointed, and made their report, between the time of the passage of the ordinance and its approval by the mayor.

The mayor had signed the ordinance before the petition was filed. The ordinance having been approved, the report of the committee, with the ordinance, was sufficient to sustain the petition. A question similar to this was raised in *Gurnee* v. *City of Chicago*, 40 Ill. 167. That was under a special charter, and under the old constitution, yet under provisions of a charter almost identical with those under the present general Incorporation act. There the commissioners were appointed and sworn to make the special assessment, on the 28th of September, while the ordinance was passed on the 25th but not presented to the mayor for approval until the 30th. It was there said if the authority to take the oath had been alone contained in the ordinance, then it would have been premature and unauthorized, but that the oath was required by the statute, and it did not require the oath to be taken after the approval of the ordinance, and that the taking of the oath was a literal compliance with the law,—all which may be repeated pertinently with reference to the present objection. It is the statute, and not the ordinance, which requires the appointment of commissioners who shall make an estimate of the cost of the improvement contemplated by the ordinance, and it is not required to be done after the approval of the ordinance.

A further objection made is, that this is a special assessment, and the required steps in a special assessment proceeding have not been taken. Clearly this is a case of proceeding by special taxation, and not by special assessment.

Of the various objections filed in the county court, the foregoing appear to be all which are here insisted upon. We find them to be insufficient, and that the county court erred in dismissing the petition.

The judgment will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

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129 155
29a 501
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37a 326
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150 533
152 149
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159 539
51a 122
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157 378
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106a 8165
109a 9559
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110a 307
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THE CITY OF CHICAGO

v.

MICHAEL KEEFE, Admr.

Filed at Ottawa May 15, 1885—Rehearing denied September Term, 1885.

1. CITIES AND VILLAGES—*injury from defective sidewalks—duty and liability in respect thereto.* On principles of common law, an action lies against a municipal corporation, for damages resulting from its negligence in keeping public streets and sidewalks in repair, where the duty to make the repairs is fully declared, and adequate means are furnished the city to perform the duty.

2. A city incorporated under the general Incorporation law owes the duty of keeping its streets, sidewalks, etc., in repair, and is clothed with adequate powers and means for that purpose.

3. SAME—*as to the character of use of a street or sidewalk allowable, in view of the liability of the municipality.* The statute does not impose the duty upon incorporated cities to keep their streets and sidewalks in proper repair for travelers only, but for all persons lawfully using the same, without regard to the motives and objects of those passing over them. Persons using them for recreation or amusement not unlawful, or from mere idle curiosity, are as much within the protection of the law as those in the pursuit of their legitimate and necessary business.

4. So a city incorporated under the general law is liable in damages to the next of kin of a child, who, while rolling a hoop along a sidewalk out of repair, is injured in consequence of the defective state of the sidewalk, and who dies from such injury, when such child, at the time of the accident, was not guilty of negligence in failing to use the care for its safety required of one of its age, and when the city had notice of the unsafe condition of the walk before that time, or might have known its condition by ordinary care and diligence. And it makes no difference that such child was rolling a hoop at the time of the injury, when there is no ordinance prohibiting or regulating the rolling of hoops upon the sidewalks.

5. SAME—*of imputing negligence to a minor in the use of a sidewalk.* In determining whether a boy, a little over ten years of age, was or was not guilty of negligence in rolling a hoop over a defective sidewalk, where he is injured, all the circumstances in evidence, including his age, should be considered. If he exercised such care for his safety, as, under the circumstances, might be expected from one of his age and intelligence, it will be sufficient.

6. SAME—*negligence as a question of fact.* Whether a child ten and a half years old, who is injured while rolling a hoop along a sidewalk in consequence of its unsafe condition, was guilty of negligence on its part or not,

is a question of fact, to be determined by the jury from all the evidence in the case, and not one of law, to be determined by the court. The law neither infers negligence, nor its absence, from the fact of the child rolling a hoop.

7. ACTION *for death of a minor—from negligence, etc.—by whom it may be maintained.* Where a minor loses his life through the negligence, default or wrongful act of another, the statute giving an action to his personal representative does not limit the right of recovery to his father, or for his benefit, merely because he may have been entitled to his services and earnings. The jury should not, by instruction, be confined in their assessment of damages to the pecuniary loss of the father and mother of the deceased, excluding that of his surviving brothers and sisters.

8. SAME—*measure of damages.* The question of the compensation to be awarded to the next of kin of a deceased person, under the statute, (chap. 70, sec. 2,) for their pecuniary loss from his death, is not in its nature capable of exact determination. Therefore the jury should calculate the damages in reference to a reasonable expectation of benefit, as of right, or as of grace or favor, from the continuance of the life.

9. INSTRUCTION—*on court's own motion—whether imperative.* While a court may very properly give an instruction on its own motion, in a case, yet its failure to do so can not be urged as error. By failing to ask for a particular instruction, or one on a particular branch of the case, the party complaining must be regarded as waiving any right to the same.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. W. H. BARNUM, Judge, presiding.

This was an action on the case, by Michael Keefe, administrator of the estate of Michael Keefe, deceased, against the city of Chicago, for injuries causing the death of the intestate, resulting from the negligence of the city in failing to keep one of its sidewalks in repair.

The intestate, a lad of ten and a half years of age, while rolling his hoop along a sidewalk of Butterfield street, stepped on the end of a loose board, which flew up and struck his knee, and thereby caused him to fall down with some violence. In falling, his eye came in contact with the end of the stick with which he had been propelling his hoop. The force of the fall caused the stick to penetrate the eye, and destroy it, and break off some of the adjacent bone. He died

from the effects of the injury, two months afterwards. The sidewalk where this fall occurred was badly out of repair,—stringers were gone, and boards were loose and rotten,—and it had been in this condition for some time. The plaintiff is the father of the deceased, and the suit is brought, under the statute, for the benefit of the next of kin, who are the father, mother, four brothers and four sisters. Verdict was returned by the jury, for the plaintiff, assessing the damages at $2500. Motion for new trial was overruled, and judgment rendered upon the verdict. On appeal to the Appellate Court for the First District the judgment was affirmed, and that judgment is brought before this court for review, by the present appeal.

Mr. CLARENCE A. KNIGHT, for the appellant:

The sidewalks are not made as a play-ground for children, but for the passage of pedestrians. All persons are bound to use their eyes, and ordinary care, and failing to do so no recovery can be had for any injury received. *Kewanee* v. *DePew*, 80 Ill. 119.

The liability of the city must be considered with reference to the use of the sidewalk for ordinary travel, which does not mean it shall be reasonably safe for a boy to roll a hoop. *Chicago* v. *Bixby*, 84 Ill. 83; *Gavin* v. *Chicago*, 97 id. 66; *Stinson* v. *Gardner*, 42 Me. 248; *Blodgett* v. *Boston*, 8 Allen, 237; *Donoho* v. *Vulcan Iron Works*, 7 Mo. App. 447.

The correct rule is, that the boy was bound to exercise such care as might be expected from a person of his age and discretion. *Bloomington* v. *Perdue*, 99 Ill. 329.

It was the duty of the court to give an instruction to guide the jury in the assessment of damages. 3 Sutherland on Damages, 731; *Peters* v. *Railroad Co.* 46 Iowa, 399; *Tipton* v. *Triplett*, 1 Metc. 570.

The father of the deceased being entitled exclusively to his earnings during his minority, the proper measure of damages would be the value of the child's services from the time of the

injury till he would have arrived at his majority, taken in connection with his prospects in life, less support and maintenance. *Kerr* v. *Forgue*, 54 Ill. 484; *Barly* v. *Railroad Co.* 4 Biss. 434; *Railway Co.* v. *Freeman*, 36 Ark. 41; *Pennsylvania Co.* v. *Lilly*, 73 Ind. 252; 2 Thompson on Negligence, 1292.

Mr. A. W. GREEN, and Mr. M. W. ROBINSON, for the appellee:

The city council has the power to prevent and regulate the rolling of hoops on the sidewalks. (Rev. Stat. 1874, chap. 24, art. 5, sec. 1, clause 92.) In the absence of the exercise of such power, the boy was not prevented from going along the sidewalk rolling a hoop; and if, while so going, and using such care as, from his age and intelligence, was required of him, he was injured because of the unsafe condition of the sidewalk, the city is liable. *McGarry* v. *Loomis*, 63 N. Y. 104; *Railway Co.* v. *Fielding*, 48 Pa. St. 320; *Kerr* v. *Forgue*, 54 Ill. 482; *Railroad Co.* v. *Gladmore*, 15 Wall. 401; *Robinson* v. *Cone*, 22 Vt. 213; *Chicago* v. *Major*, 18 Ill. 349.

The instruction as to the measure of damages was properly refused. Damages are not to be given merely in reference to the loss of a legal right, but they are to be calculated in reference to a reasonable expectation of pecuniary benefit from the continuance of the life. *Franklin* v. *Railroad Co.* 3 Hurl. & Nor. 211; *Dalton* v. *Railroad Co.* 93 E. C. L. 296; *Railroad Co.* v. *Shannon*, 43 Ill. 347; *Railroad Co.* v. *Becker*, 84 id. 483.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant asked the court to instruct the jury as follows:

"The jury are instructed that the sidewalks of the city are not made for the purpose of a play-ground for children, nor as a mere place for the recreation of children, and that the condition of the sidewalk is only to be considered with reference to its use for the ordinary travel along the same.

"The jury are instructed that if they believe, from the evidence in this case, that the deceased, Michael Keefe, was, at the time in question, playing upon the sidewalk, by rolling a hoop along the same, then you are instructed that if you believe, from the evidence, that he would not have fallen or have been injured if he had gone along the sidewalk in the ordinary mode, then you must find for the city, as the sidewalks are not made for the purpose of a play-ground for children."

But the court refused to give the instructions, and this ruling presents the first and principal question discussed in the arguments before us.

Counsel for appellant cite and rely upon *Stinson* v. *Gardner*, 42 Maine, 248, and *Blodgett* v. *Boston*, 8 Allen, 237, in support of the instructions. These decisions are based upon the principle announced in *Blodgett* v. *Boston*, that the liability of towns and cities for injuries to persons or property occasioned by defects in highways, is intended to be commensurate only with the duty imposed on them,—that is, to keep them in repair, "so that they may be safe and convenient for travelers at all seasons of the year." In the view of the New England courts there is no implied liability for injuries resulting from defective streets or sidewalks,—the liability is wholly statutory. And as observed by Dillon, in his work on Municipal Corporations, section 786, "an important consequence is, that every case of this character must be within the statute." (See, also, notes on page 749, first edition.) On the contrary, we hold, on principles of common law, that an action for damages resulting from negligence will lie against a municipal corporation if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty. *Browning* v. *City of Springfield*, 17 Ill. 143; *Scammon* v. *City of Chicago*, 25 id. 424; *Clayburgh* v. *City of Chicago*, id. 535; *City of Bloomington* v. *Bay*, 42 id. 503.

It is not attempted to be controverted in this case that the city of Chicago owes the duty to keep its streets, sidewalks, etc., in repair, and that this is the fact will be seen by reference to the various provisions of the general law in relation to the incorporation of cities, villages, etc., under which the city of Chicago is incorporated, applicable to this subject. (Rev. Stat. 1874, chap. 24.) Nor is it denied that the city had adequate means within its power for that purpose. There is no limitation in the statute that the streets shall be kept in repair "for travelers." They are to be kept in repair as streets, and, by necessary implication, for all the purposes to which streets may be lawfully devoted. We assume as self-evident that, with us, streets are open to the use of the entire public, as highways, without regard to what may be the lawful motives and objects of those traversing them,—that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travelers, or in the pursuit of their daily avocations. (See *Donoho* v. *Vulcan Iron Works et al.* 7 Mo. App. 447, and same case in 75 Mo. 402.) In crowded cities, their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long as the rights of others being on or passing along the street shall not be prejudiced thereby? We can perceive no reason. Such use is certainly the universal custom, and the lawfulness of rolling hoops along streets, when not prohibited by ordinance, is impliedly conceded by the 92d subdivision of section 1, article 5, chapter 24, of the Revised Statutes, which empowers the common council to prohibit or regulate it by ordinance. The right to *regulate* necessarily assumes the lawfulness of that which is to be *reg-*

ulated,—without regulation until it shall be prescribed, and in conformity with the regulation after it shall be prescribed. Since, then, there is not here shown to have been any ordinance either *prohibiting* or *regulating* the rolling of hoops, it is to be assumed that this child was, at the time he was injured, lawfully passing along the sidewalk,—that the fact that he was rolling a hoop, while pertinent on the question of whether he was guilty of contributive negligence, did not, *per se*, deprive him of any right in respect of passage along the sidewalk which he would otherwise have had, and that the duty of the city towards him was precisely the same that it was towards a child of the same age and mental capacity, exercising the same degree of care, passing along the sidewalk without a hoop. Indeed, the rule seems to be, that although a party may be doing an unlawful act at the time he is injured through the negligence of another, this will not prevent a recovery, unless the act is of such a character as would naturally tend to produce the injury. (*Sutton* v. *Town of Wauwabasa*, 29 Wis. 22; Wharton on Negligence, (2d ed.) sec. 995.) Whether this child was guilty of contributive negligence, was a question of fact, to be determined by the jury from all the evidence in the case, and not a question of law, to be determined by the court from the circumstance that he was rolling a hoop. The law neither infers negligence, nor its absence, because he was rolling a hoop, since, as a matter of fact, he may have rolled a hoop along the sidewalk and yet have observed the highest degree of care in passing along,—*i. e.*, it is not impossible that he may have done so, just as, at another time, he may have been passing along the sidewalk in a grossly negligent manner without a hoop, and on a business errand. The question of law is, simply, what is the degree of care he should have observed to entitle his administrator to recover. Whether, his conduct all considered, he observed that degree of care, was the question of fact.

These instructions, as framed, were argumentative of fact and law, rather than declarative of a simple rule of law, as instructions to the jury should be; and, in our opinion, their tendency was to mislead the jury, and they were therefore properly refused.

Objection is urged that the instruction given at the instance of appellee limits the degree of care to have been observed by the intestate to such as, "from his age and intelligence, under the circumstances in evidence, was required." The phraseology employed is not free of objection, but we do not think the instruction calculated to mislead. Counsel say it should have been limited to "such care as might be expected from a person of his age and discretion." Substantially, there seems no important difference. The circumstances in evidence are always to be taken into consideration in such cases; and if the intestate exercised such care as, under the circumstances, might be expected from one of his age and intelligence, it was sufficient. What was said does not materially vary, in sense, from this.

Appellant asked, but the court refused to give, the following instruction:

"The jury are instructed, as a matter of law in this case, that the father and mother of Michael Keefe were entitled to his earnings until he arrived at the age of twenty-one years, and that until he arrived at the age of twenty-one years the brothers and sisters of Michael Keefe were not entitled to any pecuniary aid from him, and should therefore only consider the pecuniary loss, if any, that you may believe, from the evidence, (if you should find the city guilty,) the father and mother of Michael Keefe may have sustained."

And this, also, is urged as error. We think the instruction was properly refused. The statute does not so limit the right of recovery. The jury may give, in such cases, "such damages as they shall deem a fair and just compensation,

with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased," etc. (Rev. Stat. 1874, chap. 70, sec. 2.) The question is, in its nature, incapable of exact determination, (*Chicago and Alton Railroad Co.* v. *Shannon*, 43 Ill. 347,) and the jury should therefore calculate the damages in reference to a reasonable expectation of benefit, as of right, or otherwise, from the continuance of the life. (*Franklin* v. *S. E. Railroad Co.* 3 Hurl. & Nor. 211; *Dalton* v. *S. E. Railroad Co.* 93 E. C. L. 296.) Parents, and even brothers and sisters, might reasonably expect, in many ways, to derive pecuniary benefit from the continued life of the intestate, as of grace and favor, if not of right, at any age of life, and our statute imposes the duty of support, in the event of their becoming paupers, of the parent by the child, and of one brother or sister by another brother or sister. Rev. Stat. 1874, chap. 107, sec. 2.

No objection was taken to the sufficiency of the declaration, by demurrer or motion in arrest, and no question arose on the trial on the admission or exclusion of evidence. No error is claimed in any instruction given at the instance of appellee, on the question of damages, nor is it claimed that any error was committed in refusing to give any instruction asked by appellant on that subject, other than the one to which we have already referred. But the point is made that the circuit court erred in not definitely instructing the jury on that question, of its own motion. That the court might very properly have done so, or, indeed, that it was most advisable that it should have done so, we may concede, yet we can not hold that the omission was error. Appellant's counsel had the matter entirely in his own hands, and consistently with our practice, it was his duty to raise the question he now wishes to discuss, by requiring some ruling thereon during the trial. He might certainly consent to let the jury retire without instructions on the subject of damages, or on any other subject; and when, here, he permitted them to retire instructed only as

they were, we think he must be deemed to have waived any rights that he might otherwise have had to be further heard in that regard. He presented no instructions to the court, in writing, on the subject of damages, generally, nor does he appear to have made any request of the court to instruct them upon that subject, generally. His objection can not be now urged. The question of the amount of damages, as we have repeatedly held, is not before us, in cases like the present.

The judgment is affirmed.

Judgment affirmed.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

PER CURIAM: A petition for rehearing has been presented in this case, and the argument in support of it has received careful consideration. We remain of the opinion heretofore announced. In what we have said we had reference only to the state of facts before the court. A sidewalk is for the passage of *persons*, only, and we have not had in contemplation any use of it otherwise. Whether it be passed over for business or for pleasure, or merely to gratify idle curiosity, we think the use is lawful. A child may lawfully be upon the sidewalk for pleasure, only,—that is to say, for play,—and the city owes the same duty to have the sidewalk in a reasonably safe state of repair, in respect of it, that it does in respect of those who are on the sidewalk passing to or returning from their places of business or abode. It may be true that the child will be less careful in its mode of using the sidewalk while playing, than the business man will be while traveling to or from his place of business or abode; but this belongs to the domain of fact, and not to that of law. It may be so in most cases,—it is not inevitably so in all cases. It is for the jury, not the court, to say what, in a given case, was the conduct of the parties.

Our attention is called to an expression used in *City of Chicago* v. *Starr, Admr.* 42 Ill. 177, wherein it is said: "For

it is to be borne in mind that it is not the duty of the city of Chicago to make its streets a safe play-ground for children. That is not the purpose for which streets are designed." This expression does not occur in the statement of a legal principle, nor in the argument of a legal proposition, but it occurs in an argument upon a question of fact, purely,—namely, whether, in that case, the intestate was guilty of that degree of contributive negligence which precluded a recovery. At that time this court reviewed on questions of fact as well as of law, and often these questions were so intermingled in the discussion, that it requires some effort and care to distinguish between them. It was, in the case referred to, assumed as a matter of fact that children, in playing, will be more careless than persons who are simply passing along, and the only legal proposition is one that is implied in the argument, and that is, that the measure of duty of the city in regard to its streets is limited by the necessities of the ordinary modes of traveling or passing along the streets. If they were not kept up to this requirement, and children in playing did not subject them to greater burdens, or essentially different uses, certainly it was not contemplated that the fact of the children being at play should bar a recovery for injuries resulting from the condition of the streets. That this was the view is quite evident from *Kerr* v. *Forgue*, 54 Ill. 484, where a recovery was had for an injury occurring to a child through negligence, although the child, at the time of the injury, was engaged in an act of play, in which case *Chicago* v. *Starr* is referred to and distinguished. The decisions of the lower court have, under the statutes now in force, relieved us of all questions of controverted fact, and in instructing a jury, trial courts are only authorized to instruct on questions of law. It is not proper to instruct on the facts, nor, in the form of instructions, to argue the facts.

The rehearing is denied.

Rehearing denied.

Syllabus.

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JOHN W. CONNETT

v.

THE CITY OF CHICAGO.

Filed at Ottawa May 15, 1885.

1. CITY ATTORNEY—*his power in respect to an appeal.* A city attorney elected by the people, whose duty it is to look after and protect the interests of the city in all legal controversies, will have power, on behalf of the city, to pray for an appeal from a judgment against the city, and prepare the necessary steps for taking the same. All his acts within the scope of his authority will be binding on the city.

2. SAME—*duty in respect to suits, and presumption in respect thereto.* After having taken the necessary steps for an appeal from a judgment against the city, it is the duty of the city attorney to report the condition of the case to the city council, together with his views in respect to the propriety of taking the appeal; and in the absence of proof to the contrary, it will be presumed he has discharged his duty in such respect.

3. SAME—*validity of agreement to submit to arbitration, made by him, when not disaffirmed, or is ratified by city.* Where a city attorney, after praying for an appeal from a judgment against the city, agreed with counsel for the plaintiff to submit the question of the liability of the city to the arbitrament and decision of an arbitrator, if the city council, after the lapse of several months, made no objection to the agreement to arbitrate, and afterward availed of the decision of the referee by bringing suit to have his decision carried into effect, it was *held*, that the other party could not avoid the effect of the award on the ground of want of authority on the part of the city attorney to bind the city by his agreement.

4. RATIFICATION—*of acts of agent.* Where a contract entered into on behalf of a named principal, is one which the principal himself might lawfully make, it may be ratified by the principal, and thus given effect. Such ratification may be shown by circumstances, or it may be inferred by acquiescence after notice.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Messrs. STILES & LEWIS, for the appellant:

The city attorney had no authority to make the agreement sought to be enforced. The general authority of a city at-

torney in a suit is no more than that of an attorney in any suit. *People* v. *Mayor*, 11 Abb. Pr. 66.

The power of an attorney after judgment extends only to the issuing of execution and receiving the debt. *Kellogg* v. *Gilbert*, 10 Johns. 220; *Jackson* v. *Bartlett*, 8 id. 361.

It has been held in this State that a solicitor's connection with a case terminates with the final decree, and that notice to the solicitor of a motion to modify the decree, is not, for that reason, notice to the party. *Swift* v. *Allen*, 55 Ill. 303. Other cases imply a similar doctrine. *Quinn* v. *Lloyd*, 5 Abb. Pr. 281; *Richardson* v. *Talbot*, 2 Bibb. 382; *Herbert* v. *Montgomery*, 5 Dana, 11; Weeks on Attorneys, sec. 250.

After judgment a new attorney may appear, and take any step that is necessary to enforce the judgment, without a substitution. *Thorp* v. *Fowler*, 5 Cow. 446; *Tiffing* v. *Johnson*, 2 Bos. & Pul. 357; *Marr* v. *Smith*, 4 B. & A. 466; *Egan* v. *Rooney*, 38 How. Pr. 121.

The old attorney has no authority, by virtue of his original retainer, to prosecute an appeal or writ of error. *Covill* v. *Phy*, 24 Ill. 37; *Batchelder* v. *Ellis*, 7 T. R. 337; *Ex parte Holbrook*, 5 Cow. 35.

An appeal is a new action brought by the party appealing, and, like a writ of error, may be prosecuted by a new attorney. To take a case up by appeal or writ of error, a new retainer is necessary. *Covill* v. *Phy*, 24 Ill. 37; *Batchelder* v. *Ellis*, 7 T. R. 337; *McLaren* v. *Chainer*, 5 Paige, 530; *Butt* v. *Allen*, 19 How. Pr. 450; *McDonald* v. *McConkey*, 54 Cal. 143.

No city officer can bind a city by a submission, without special authority. Power must be exercised by ordinance or resolution. *City of Shawneetown* v. *Baker*, 85 Ill. 563; Dillon on Mun. Corp. sec. 478.

Generally, an agent can not bind his principal by an agreement to arbitrate, without special authority. *Railroad Co.* v. *Gouger*, 55 Ill. 503; *Trout* v. *Emmons*, 29 id. 433; *Ingraham* v. *Whitman*, 75 id. 24; Morse on Arbitration, 10, 11.

There is no inclination in Illinois to enlarge the implied powers of an attorney in a suit at law. He has no power, simply by virtue of his general retainer, to compromise the suit, (*Nolan* v. *Jackson*, 16 Ill. 272, *Wadhams* v. *Gay*, 73 id. 416,) or to waive his client's rights, (*Wadhams* v. *Gay*, 73 Ill. 416,) or to consent to judgment against his client, (*People* v. *Lamborn*, 1 Scam. 123, *Wadhams* v. *Gay*, 73 id. 416,) or to bind his client by any agreement outside of the conduct of the cause. *Brooks* v. *Kearns*, 86 Ill. 547.

MR. CLARENCE A. KNIGHT, for the appellee:

The authority conferred upon an attorney includes all the necessary and usual means of executing with effect. Story on Agency, sec. 58; *Foster* v. *Wiley*, 27 Mich. 244; *Clark* v. *Ramsdell*, 9 Wis. 128; *Railroad Co.* v. *Koerne*, 3 Bradw. 250.

The effect of a retainer to prosecute or defend a suit, is to confer on the attorney all the powers exercised by the forms and usages of the court in which the suit is pending. *Inhabitants* v. *Inhabitants*, 16 Mass. 74; *Adams* v. *Robinson*, 1 Pick. 462; *Holke* v. *Parker*, 7 Cranch, 436; *Buckland* v. *Conway*, 16 Mass. 396; *Abbe* v. *Rood*, 6 McLean, 106.

An agreement to refer a cause or to arbitrate, comes within the scope of the Attorney General's contract. *Scarborough* v. *Reynolds*, 12 Ala. 252; Weeks on Attorneys, 403; *Winslow* v. *Anderson*, 4 Mass. 377; *Stokely* v. *Robinson*, 34 Pa. 315; *Coleman* v. *Grubb*, 23 id. 393; 55 N. H. 559; *White* v. *Davidson*, 8 Md. 169; *Hanson* v. *Hoitt*, 14 N. H. 56; 33 id. 479.

A corporation will be bound, like any other client, by the submission of its counsel entered into, in a cause; and it is not necessary that there should be any document executed, with the corporate seal, in order to confer authority upon the counsel. Morse on Arbitration, 19; Russell on Arbitration, 26.

Counsel employed to bring or defend a cause, have power to submit it to arbitration. Morse on Arbitration, 15.

An attorney should take measures to have a judgment reviewed, if the client is in such a condition that he can not be consulted. Weeks on Attorneys, 421.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

The wife of John W. Connett, the appellant, received an accidental injury, in the city of Chicago, on the 6th of September, 1869, occasioned by a defective sidewalk. On the 17th of June, 1874, Connett commenced an action of assumpsit against the city, to recover expenses incurred by him for the nursing, attendance and treatment of her while disabled from said injury. On March 2, 1876, the form of the action was changed, at the instance of plaintiff, from assumpsit to an action on the case, whereupon a new declaration was filed in the cause, charging the city, in the usual form, with negligence in permitting the sidewalk in question to be and remain out of repair, etc., whereby the injury was occasioned, etc. To this declaration the city filed three pleas: First, the general issue; second, that the cause of action did not accrue within five years next before the change of the form of action from assumpsit to case; and third, that the cause of action did not accrue within five years next before the commencement of the suit. A demurrer was sustained to the second plea, and issues joined on the other two. The cause was tried on these issues March 20, 1876, resulting in a finding and judgment in favor of the plaintiff for $1500. From this judgment the city prayed an appeal. Before the appeal was perfected, to-wit, on the 22d of April, 1876, Egbert Jamieson, city attorney, acting on behalf of the city, and Messrs. Tuley, Stiles & Lewis, the attorneys of record of Connett, acting on his behalf, entered into the following agreement:

"There is submitted to his Honor, Judge W. K. McAllister, the following questions only: Was defendant's second plea a good plea in bar, and does the evidence sustain the third

plea in bar of plaintiff's action. It is agreed that if the decision should be in favor of the defendant, the plaintiff shall release said judgment; if in favor of plaintiff, then the appeal prayed by the city should be withdrawn."

In pursuance of the above submission, in the month of June following, Judge McAllister rendered his decision upon the questions submitted, both of which were determined by him in favor of the city. Connett having declined to release the judgment, the city, on the 11th day of January, 1878, filed the present bill to enjoin the collection of said judgment, and to compel Connett to enter satisfaction thereof on the record. Upon the hearing, the circuit court of Cook county entered a decree in conformity with the prayer of the bill, which, on Connett's appeal, was affirmed by the Appellate Court for the First District, whence the cause is brought to this court.

The decree in this case is assailed solely on the alleged ground that the action of the city attorney in entering a motion for an appeal from the judgment against the city, and also in entering into the agreement with Connett to submit the questions involved in the proposed appeal to the arbitrament and decision of Judge McAllister, was unauthorized, and consequently not binding upon the city. This being assumed, the conclusion is drawn, that, inasmuch as the city was not bound, Connett himself was not, and that he consequently had a right to enforce his judgment against the city. In support of this view of the case, counsel for appellant have formulated, in their brief, quite a number of general propositions, accompanied by numerous adjudicated cases supporting them, to the effect that the authority of an attorney employed to defend a suit, ends with its determination; that the power of the plaintiff's attorney, "after judgment, extends only to the issuing of execution and receiving the debt;" that a retainer of an attorney to prosecute or defend in a trial

court does not authorize him to prosecute an appeal or writ of error in the same case; that an attorney, merely by virtue of his retainer, has no power to submit the cause to a common law arbitration; and that, generally, an agent can not bind his principal by an agreement to arbitrate, without special authority. These several positions, considered as general propositions, are not at all questioned. We are of opinion, however, a city attorney, elected by the people, occupies a somewhat different position from one employed to prosecute or defend in a particular case. Subject to the general supervision which the city council has over him, it is his duty to look after and protect the interests of the city in all legal controversies and litigation, so far as he is able, unless directed by the city to the contrary, and his acts, within the general scope of his authority, will be deemed the acts of the municipality. It is his duty, from time to time, to report to the corporate authorities the condition of all suits of which he has charge, and other legal matters referred to him for investigation or adjustment, whether pending in court or out of court. The general principle that officers are presumed, in the absence of anything to the contrary, to do their duty, applies equally to a city attorney in the discharge of these duties. Such being the general scope of his powers and duties, we do not concur in the view that the city attorney had no power or authority, after judgment passed against the city, to enter a motion on its behalf for an appeal. On the contrary, we are of opinion that he not only had the power, but that it was highly proper for him to do so. After having thus prepared the way for an appeal, it was his duty to report the condition of the case to the city, together with a statement of his views with respect to the propriety of taking the appeal,—and it is presumed he performed his duty in this respect.

It is not necessary to inquire whether the city attorney, by virtue of his general powers, was authorized to enter into the

agreement with appellant by which the decision of the case was referred to Judge McAllister, for it may be conceded he was not. We also agree with counsel for appellant that said agreement, if valid at all, is valid as a contract, and that in determining its force and legal effect, the general rules and principles applicable to other contracts purporting to be made by an agent on behalf of a principal, are to be applied. It is, however, to be noted, the city is not complaining, here, that there was no authority in the city attorney to make the contract on its behalf, nor is there the slightest evidence in the record tending to show that such authority did not exist. But it is answered that the burden is upon appellee to show affirmatively the existence of such authority. Concede the circumstances disclosed by the record fail to show precedent authority, yet they are clearly sufficient to establish a subsequent ratification, which practically amounts to the same thing. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* No doctrine of the law is better settled than that where the contract entered into on behalf of a named principal is one which the principal himself might lawfully make, it may be so ratified, and thus given effect. Nor is it necessary such ratification should be express. It may, like most other facts *in pais*, be proved by circumstances. (Abbott on Trial Evidence, 41-43; Bishop on Contracts, sec. 330.) So a ratification may be inferred from acquiescence after notice. (*Gold Mining Co.* v. *National Bank*, 6 Otto, 646; *Benedict* v. *Maynard*, 4 McL. 569; *Abbe* v. *Rood*, 6 id. 108.) So where an agent had, without authority, entered into an agreement to submit a controversy to arbitration, a suit by the principal on the agreement was held a sufficient ratification. (*Smith* v. *Morse*, 9 Wall. 82. See, also, Chitty on Contracts, 10th Am. ed. page 15, *et seq.*) In this case, it will be remembered, the contract was entered into in April, and the decision of Judge McAllister was not rendered until in June

following, and it may well be presumed the city could, hardly, during all this time, have been ignorant of its existence, and that the case was then pending for decision before the court. Such being the case, if the agreement was not made by its authority, the city should have interposed, and not having done so, under the circumstances its silence will, at least as against appellee, be deemed a ratification.

What is here said of appellee's duty to speak, applies with equal force to appellant. With eminent counsel to advise him, he deliberately entered into the contract, or, at least, his counsel did, on his behalf, (and he does not question their authority to do so,) after which he quietly stood by, speculating on the chances of a favorable decision from Judge McAllister, never intimating a doubt as to the authority of the city attorney to bind the city, until after the case was decided against him,—then, for the first time, when the existence of such authority could be of no possible advantage to him, by reason of the decision being against him, is the question in respect to it raised, for the sole purpose of defeating an agreement he would gladly have profited by. Such a defence as this, under the circumstances shown, does not commend itself to a court of equity. By his entering into the agreement, and his inexcusable delay in raising any question as to a want of authority in the city attorney to make it, the city lost its right of appeal, and it would be clearly inequitable to permit appellant to profit by such a course of conduct.

But waiving all this, we hold the filing of the present bill is of itself sufficient evidence of a ratification, on the part of the city, of the agreement in question, which is fatal to the defence of appellant, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

FREDERICK AHOLTZ *et al.*

v.

ISAAC V. GOLTRA *et al.*

Filed at Springfield June 12, 1885.

1. CHANCERY JURISDICTION—*set-off against judgment at law.* A court of equity will not assume jurisdiction to set off unliquidated damages claimed by the principal judgment debtor against a judgment, where no reason is shown why the remedy at law is not adequate and complete, and it is not made to appear that the judgment creditors are insolvent. The fact that one of them is a non-resident of the State and the other of the county, does not show that a legal demand may not be recovered of them, or one of them, at law.

2. SAME—*when there is a remedy at law—generally—dismissal on demurrer.* Where it appears that a complainant has a full and complete remedy at law, his bill may be dismissed on demurrer for want of equity. If any reason exists why the remedy at law is not available, it should be alleged.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Macon county; the Hon. J. W. WILKIN, Judge, presiding.

Mr. H. PASCO, for the appellants.

Messrs. BUNN & PARK, for the appellees.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by Frederick Aholtz and George Stare, against Isaac V. Goltra, Edward O. Smith and William W. Foster, in the circuit court of Macon county, and is for an injunction, and relief. It is alleged in the bill that defendants Goltra and Smith recovered a judgment at law in the circuit court, against complainants, on an appeal bond, in the sum of $300, with interest and costs; that they had caused an execution to be issued on such judgment, and that defendant Foster, who is sheriff of Macon county, is about to levy the same on the property of one or both of com-

plainants. No complaint is made against the regularity or justness of the judgment. It was recovered in an action of debt on an appeal bond, wherein complainant Aholtz was principal, and his co-complainant, Stare, was surety for him. It is alleged that complainant Aholtz was the owner of certain town lots in Blue Mound, in Macon county, with a dwelling house situated thereon; that Goltra and Smith, by wrongful means, and by collusion with a then tenant of Aholtz, got possession of the house and premises without his knowledge, and by themselves and their tenants, since April, 1875, for a period of over eight years, forcibly kept the possession from complainant Aholtz; that he had only recently regained possession of the premises, and that during the period defendants withheld the same from complainant they were reasonably worth the sum of $120 for each year, amounting, in the aggregate, to the sum of $1000. There is also an allegation in the bill the premises were damaged by the defendants, or their tenants, to the extent of $50, which, together with the reasonable rent due, makes a total sum of $1050 due from defendants Goltra and Smith to complainant Aholtz. The prayer of the bill is, that an account may be taken, by and under the direction of the court, first, of the amount due to defendants Goltra and Smith on the judgment in their favor; and second, for an account of the reasonable rental value of the premises, and improvements thereon, during the time the defendants held the same and kept complainant Aholtz out of possession; that one claim be set off against the other; that the amount that may be so found to be due to defendants on such judgment, with the interest and costs, be first paid and satisfied, and that complainant Aholtz have a decree against Goltra and Smith for the remainder, for whatever may be found due to him for the reasonable rent and damages to the premises, and in the meantime that an injunction issue restraining the sheriff from levying the execution on the property of either complainant, and for general relief. To the bill

stating these facts, and others, some of which may be stated further on, the court sustained a demurrer, and dismissed it for want of equity. That decree was affirmed in the Appellate Court for the Third District, and complainants bring the case to this court on their further appeal.

It very clearly appears complainants have a full, complete and adequate remedy at law, and their bill was therefore very properly dismissed, on demurrer, as was done, for want of equity. The bill contains no allegation whatever that would warrant a court of chancery to assume jurisdiction. It is nowhere alleged defendants Goltra and Smith, or either of them, are insolvent, and no reason is shown why complainant Aholtz may not proceed at law to recover whatever, if anything, may be due to him from either or both defendants. The only ground suggested in the bill is, that neither defendant resides in Macon county, so that process from the circuit court of that county could be legally served upon them. It is averred that Smith is a non-resident of the State, and that Goltra is a non-resident of Macon county, but that the latter named defendant resides in Sangamon county, in this State, which, of course, is the next adjoining county to Macon. No reason is shown why complainant Aholtz can not pursue his remedy at law against Goltra, and recover anything that may be due him, either from him or from Goltra and Smith. No ground whatever is suggested for equitable relief, and as it does not appear but what complainants had a full, complete and adequate remedy at law, they will be remitted to a common law court for the recovery of anything that may be due to either of them. The claims they insist upon, if valid, are legal claims, and no reason appears why equity should assume jurisdiction to adjust them.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

JOHN STAFFORD

v.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY.

Filed at Ottawa June 13, 1885.

114 244
26a 362
114 244
133 262
134 213
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37a 353
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40a 476
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152 466
45a 137
114 244
49a 231
49a 367
51a 462
52a 226
114 244
46a 80
114 244
53a 418
56a 238
57a 225
57a 646
58a 611
114 244
70a 334
114 244
73a 426
74a 162
114 244
176 128
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97a *363
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193 †177
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101a *324

1. FELLOW-SERVANTS—*injury to one from the negligence of another—liability of the common master.* Where one servant is injured by the negligence of a fellow-servant, the duties of both being such as to bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury.

2. SAME—*burden of proof—negligence of master.* In a suit by a servant against his employer to recover damages for a personal injury from negligence of a fellow-servant, if it is claimed that the master was guilty of negligence in selecting or retaining incompetent servants, the burden is on the plaintiff to prove it.

3. MASTER AND SERVANT—*injury to the latter from alleged negligence of the former—liability, when servant takes the hazard of his employment.* If a person knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless it may be caused by the willful act of the master.

4. PRACTICE IN SUPREME COURT—*vacating a judgment made under misapprehension of fact.* Where a judgment of this court is entered in vacation, reversing the judgment of the Appellate Court inadvertently, and upon a misapprehension of the facts shown by the record, it will, on its own motion, vacate such judgment and cause the proper one to be entered.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. M. LAWS, Judge, presiding.

Messrs. WILSON & RAUM, and Messrs. STEVENS, LEE & HORTON, for the appellant.

Messrs. JACK & MOORE, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

There was no oral argument in this case, and it was submitted to us for decision on the printed arguments filed in the Appellate Court, alone. From this fact we were misled, and assumed that the Appellate Court had affirmed the judgment of the circuit court, and that it was only expected that we should pass upon the errors of law insisted upon in the arguments in the Appellate Court. Accordingly, we investigated the questions arising thereon, and being of opinion that the circuit court had, in some of its rulings, erred, in that regard, against the defendant in that court, we filed an opinion in vacation, on the 15th of May, 1885, pointing out wherein we held the circuit court had erred in its rulings, and entered judgment reversing the judgment of the Appellate Court, and remanding the cause. After that opinion was filed, our attention was called to the fact that we had misapprehended the condition of the record, and that the Appellate Court, instead of having affirmed the judgment of the circuit court, as we had assumed, had reversed that judgment, and refused to remand the cause. We thereupon recalled the record in the case, and, of our own motion, we now order the judgment entered in vacation, on the 15th of May, 1885, to be vacated and wholly set aside, and that judgment be now entered (as it would then have been entered had we not then misapprehended the true state of the record) affirming the judgment of the Appellate Court.

The Appellate Court find, and recite in the record, the facts to be different from what they were found to be by the circuit court, and reverse the judgment of the circuit court because of this finding, waiving entirely the question whether the circuit court erred in its rulings upon questions of law, as contended by the defendant in that court. The recital in the record of the Appellate Court, of the findings of that court

upon the questions of fact, is this: "This court finds the facts to be, that the appellee was guilty of contributory negligence and want of ordinary care, which led to the injury complained of in the declaration, without which contributory negligence and want of care such injury would not have occurred, in this, to-wit, that the incompetency and unskillfulness of the engineer, Robert Mack, in manner complained of in the declaration, was as well known to appellee at least thirty days prior to and up to the time of the reception of the said injury by appellee, as it was or could have been known to the appellant, and that such knowledge was, on the part of appellee, full and complete. And the court further finds, that at no time prior to the time the injury was received, in manner charged in the declaration, did the appellee notify the appellant of the incompetent and unskillful character of said engineer, Mack, nor of his deficiency as such engineer, in any way, nor exact or receive a promise from appellant that it would discharge said Mack, or fill his place with a competent engineer, nor did appellee ever complain to appellant, or any of its officers, that said Mack was incompetent or unskillful in his capacity of engineer, but on the contrary, the said appellee, well knowing the unskillfulness and incompetency of said Mack as engineer of said engine, as fully as said unskillfulness and incompetency are charged in said declaration, did not leave the employment of the said appellant, but continued in the employment of appellant, as helper or switchman, working for it in company with said Mack, in manner charged in the declaration, taking his own risks of receiving any injury in said employment on account of the incompetency or unskillfulness of said Mack. The court further finds, that the said appellee and said Mack were fellow-servants in the employment of appellant, in the same line, habitually associated and working together as such servants, in its common employment, on the same engine, prior to and at the time when the appellee received the injury complained

of in the declaration." This relieves us from all inquiry, save whether, on the facts as thus found, the plaintiff below was entitled to recover. (Hurd's Stat. 1880, page 798, sec. 87.) That he was not entitled to recover is not now open to controversy. We are firmly committed to the principles—

First—Where one servant is injured by the negligence of his fellow-servant, the duties of both being such as to bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury. *Chicago and Northwestern Railway Co.* v. *Moranda*, 93 Ill. 302; *Chicago and Eastern Illinois Railroad Co.* v. *Geary*, 110 id. 383.

Second—If it be alleged the master is guilty of negligence in selecting or retaining an incompetent servant, the burden is on the plaintiff to prove it. *Columbus, Chicago and Indiana Central Railway Co.* v. *Troesch*, 68 Ill. 545; *Chicago and Eastern Illinois Railroad Co.* v. *Geary, supra.*

Third—If a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the willful act of the master. *Simmons* v. *Chicago and Tomah Railroad Co.* 110 Ill. 340; *Abend* v. *Terre Haute and Indiana Railroad Co.* 111 id. 202; *Missouri Furnace Co.* v. *Abend*, 107 id. 44; *Pennsylvania Co.* v. *Lynch*, 90 id. 334.

The judgment is affirmed.

Judgment affirmed.

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23a 134
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28a 582
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140 367
142 447
40a 544
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46a 114
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181 78
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THOMAS K. MEANS *et al.*

v.

ISHAM HARRISON, EXR.

Filed at Mt. Vernon June 13, 1885.

1. LIMITATION—*promissory note—effect of act of 1872 as to note given prior to that time.* The Limitation act of April 4, 1872, which took effect July 1, 1872, has no application to a promissory note given in January, 1872, payable two years after the date thereof. The Limitation law of sixteen years applies to such a note.

2. CONSTRUCTION OF STATUTE—*whether to give a retroactive effect, or only prospective.* As a general rule a statute is construed so that it shall operate *in futuro* only, and not to affect past transactions. If the real design is left doubtful, the statute will be construed so as to have only a prospective operation.

3. ADMINISTRATION OF ESTATES—*payment to an executor—in property.* In the absence of any direction by will, an executor's duty is to collect notes given to the testator, in money. He has no authority to exchange the same for other property.

4. So in a suit on a note against several, the defendants pleaded that the note was given for $500 of money loaned by the payee to a Masonic lodge, and that such lodge paid divers large sums of money on the note, and after the death of the payee, the plaintiff (the executor of the deceased payee) received from said lodge, in payment of the note, other property of the value of $1400: *Held*, that the plea was palpably bad, and presented no defence.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Franklin county; the Hon. DAVID J. BAKER, Judge, presiding.

This was an action of assumpsit upon a promissory note, brought against the makers thereof, Thomas K. Means, Henry Hudson, William T. Stacy, Thomas F. Tinsley, Isaac J. Clayton, A. D. Scaggs, Thomas M. Renfro, C. F. Mulkey, John T. Blake and William J. Moyers, the other makers having died. The defendants pleaded the general issue and two special

pleas, the first being that the cause of action did not accrue within ten years next before the commencement of the suit.

The last special plea avers, in substance, that at the time of the execution of the note in the declaration mentioned, said Isham Harrison, plaintiff, as agent of said Barzilla Silkwood, loaned to Polar Star Lodge No. 652, of A. F. & A. Masons, $500 for two years, said lodge then being organized and working under a charter from the Masonic Grand Lodge of Illinois, and that defendants, with T. F. Tinsley, C. F. Mulkey, J. T. Blake, W. J. Moyers, I. J. Clayton and A. D. Scaggs, being members of said lodge No. 652, executed to said Silkwood said note, to secure the payment of said sum of $500 loaned by said Silkwood, as above stated, the same being the only consideration for the execution of said note, and that said lodge No. 652 recognized and acknowledged the same as its own debt, and paid divers large sums of money on said note, without the knowledge or consent of defendants, and after the death of said Silkwood, to-wit, on the third day of August, A. D. 1882, said plaintiff received from said lodge No. 652, in payment of the note, other property of the value of $1400. The other facts appear in the opinion of the court.

Mr. THOMAS J. LAYMAN, for the plaintiffs in error:

The law limiting the right of action in force at the time the note matured and the right of action accrued, should govern the case. *Beasley* v. *Spencer*, 25 Ill. 216.

This position is not in conflict with the rule in *Dickenson* v. *Railroad Co.* 77 Ill. 331, which holds the act of 1872 is not to have a retroactive operation. We also refer to *Hyman* v. *Bayne*, 83 Ill. 256.

Mr. F. M. YOUNGBLOOD, for the defendant in error:

The act of 1872, limiting actions upon notes, etc., to ten years, was designed to operate prospectively upon causes of action already accrued.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action in assumpsit, brought by Isham Harrison, executor of Barzilla Silkwood, deceased, upon a promissory note made by the defendants and others on January 25, 1872, to said Silkwood, in his lifetime, for $500, payable two years after date, with ten per cent interest. The pleas were non-assumpsit, and two special pleas. A demurrer was sustained to the two special pleas. The cause was then submitted to the court for trial without a jury, the issue found for the plaintiff, damages assessed at $896.67, and judgment accordingly. The judgment was affirmed by the Appellate Court for the Fourth District, and an appeal taken by the defendants to this court.

The questions presented are as to the sufficiency of the second and third pleas, to which demurrers were sustained. The second plea was the Statute of Limitations,—that the cause of action did not accrue within ten years next before the commencement of the suit.

The action was commenced October 15, 1884. The time of limitation of an action on a promissory note when the note in suit was made (on January 29, 1872,) was sixteen years, under the act of November 5, 1849. By the act approved April 4, 1872, which went in force July 1, 1872, the time of limitation of an action on a promissory note was made ten years. The act of April 4, 1872, expressly repeals the act of November 5, 1849, with this provision in the repealing section: "But this section shall not be construed so as to affect any rights or liabilities, or any causes of action, that may have accrued before this act shall take effect." The question is, which act is to govern here,—the act of November 5, 1849, which was in force at the time of the making of the note, or the act of April 4, 1872, which was enacted and went in force after the making of the note, but before the time of payment of the note, before a cause of action on the note accrued.

The saving clause of the act of 1872 extends not only to causes of action, but to "any rights or liabilities, or any causes of action," which might have before accrued. The time of the payment of the note had not then (at the passage or going into effect of the act of 1872) arrived, and it may be said that a cause of action on the note had not then accrued; but can it be said that there had not accrued any right or liability with respect to the note? The payee had at that time the right to bring suit on the note at any time within sixteen years after it became due, and there was a liability on the part of the makers to be sued upon the note at any time within that period, and it was such right and liability, we think, which it was the intention of the legislature should not be affected by the act of 1872,—that the act was designed to be wholly prospective in its operation, and not to affect contracts then existing. We must think the legislature meant more than causes of action which had accrued, when they say "any rights or liabilities, or any causes of action, that may have accrued." Some additional meaning should be allowed to the words "rights or liabilities." This construction is in accord with the general rule that a statute is to operate *in futuro* only, and is not to be construed to affect past transactions, and that if it is left doubtful what was the real design as to its having a prospective or retroactive effect, the statute must be so construed as to have a prospective effect only. *Thompson* v. *Alexander*, 11 Ill. 55; *Dobbins* v. *National Bank*, 112 id. 553.

The second plea sets up that the note was given for money loaned to Polar Star Lodge No. 652, of A. F. & A. Masons; that the lodge paid divers large sums of money on the note, and after the death of Silkwood, the payee, the plaintiff received from said lodge, in payment of the note, other property of the value of $1400. The plea was palpably defective. It was to the whole cause of action. It did not state what was the property which was received. The plaintiff's duty,

as executor, was to collect the note in money. He had no authority to exchange it for other property.

We are of opinion the circuit court rightly sustained the demurrers to the two special pleas.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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STERLING P. ROUNDS

v.

NETTIE F. MCCORMICK *et al.*

Filed at Ottawa June 13, 1885.

STOCKHOLDERS—*remedy upon their liability for debts of corporation—when in equity.* The liability of stockholders under section 9 of the act of 1857, entitled "An act for the formation of manufacturing, mining, mechanical and chemical corporations," is to the creditors of the corporation as a class, and not to each individual creditor. Therefore, the remedy of a creditor seeking to enforce the personal liability created by that section, is in a court of equity, and not at law.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. R. S. WILLIAMSON, Judge, presiding.

Mr. F. W. BECKER, for the plaintiff in error:

Whether defendant might have set up the defence that the capital stock had not been fully subscribed, as against the corporation, on a call, had he not waived his right, is not pertinent to this inquiry. That he can not set up this defence, or deny the existence of the corporation, as against a creditor of the corporation, after having acquiesced in the organization, acts and contracts of the company to the extent here shown, is established by many authorities. Morawetz on Private Corporations, secs. 145, 259, 285, 576, 595; Thompson on

Liability of Stockholders, secs. 120, 400, 409, 415; *Johnston* v. *Bank*, 3 Strobh. Eq. 263; *Stillman* v. *Dougherty*, 44 Md. 380; *Hager* v. *Cleveland*, 36 Md. 476; *O. H. and W. M. Co.* v. *Canney*, 54 N. H. 295; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Abbott* v. *Aspinwall*, 26 Barb. 202; *Slocum* v. *Warren*, 10 R. I. 112; *McHose* v. *Wheeler*, 45 Pa. St. 32; *Patterson* v. *W. M. Co.* 40 id. 117; *Farrar* v. *Walker*, 3 Dill. 506; *Gaff* v. *Fisher*, 33 Ohio St. 107; *Railroad Co.* v. *Railroad Co.* 105 Ill. 110; *Hickling* v. *Wilson*, 104 id. 54; *Dows* v. *Naper*, 91 id. 44; *McCarthy* v. *Lavasche*, 89 id. 270; *Wheelock* v. *Kost*, 77 id. 296; *Corwith* v. *Culver*, 69 id. 502.

Messrs. MILLER, LEWIS & JUDSON, for the defendants in error:

The appropriate remedy was by bill in equity, and not an action at law. *Harper* v. *Manufacturing Co.* 100 Ill. 225; *Low* v. *Buchanan*, 94 id. 76.

There being no evidence that C. H. McCormick was a stockholder at the time the debt was contracted, he was not liable. *Culver* v. *Bank*, 64 Ill. 528.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This suit seems to have been brought to the October term, 1872, of the Superior Court. It is a suit at law, and was brought by Sterling Rounds, against Cyrus H. McCormick, since deceased, to enforce his supposed liability to plaintiff as a stockholder in the Chicago News Printing Company, for goods, wares and merchandise sold and delivered to the company. Since the death of the original defendant the suit has progressed against his representatives. No trial of the cause appears to have been had until 1881, when there was a finding and judgment for costs, for defendant. That judgment was reversed by the Appellate Court for the First District, and a second trial was had in 1883, which also resulted in a

finding and judgment for defendant. The latter judgment was affirmed in the Appellate Court, and now plaintiff brings the case to this court on error.

The amended declaration in this case sets forth that the Chicago News Printing Company is a body corporate, created and existing under the act of the General Assembly of February, 1857, entitled "An act for the formation of manufacturing, mining, mechanical and chemical corporations," and that such corporation, among other things, was engaged in printing a newspaper, known as "The Chicago Daily News," and carrying on a general job printing office. It was alleged defendant, Cyrus H. McCormick, was a stockholder in the corporation, and this action was brought at law to enforce his supposed liability under the 9th section of the act of 1857, for the indebtedness of the company to plaintiff. There is one reason that is conclusive why the present judgment must be affirmed. The remedy, if plaintiff has any, is in chancery, and not at law. The liability of stockholders in such corporation, under the 9th section of the act of 1857, is to the creditors as a class, and not to each individual creditor. It was so expressly held by this court in *Harper* v. *Union Manufacturing Co.* 100 Ill. 225, on the authority of *Low* v. *Buchanan*, 94 id. 76. The precise question was raised and decided in the cases cited, so the point made is no longer a new question in this court, and need not be further discussed. This view of the law being conclusive of the case, other questions made on the record need not be discussed or passed upon.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Syllabus.

114 355
78a 121

WILLIAM McDOWELL

v.

JULIA ANN McDOWELL.

Filed at Mt. Vernon June 13, 1885.

1. CHANCERY—*granting complete relief, although in respect to some of the elements in the case there was a defence at law.* While, as a general rule, where a party has an adequate remedy at law, a court of equity will not intervene, yet where equity has acquired jurisdiction of a case, such as a bill for partition of land, and to have a written contract respecting other lands specifically enforced, the court, on decreeing the equitable relief sought in that regard, may also enjoin the enforcement of a judgment against the complainant in a forcible detainer suit for possession of the land, although he might have defended that suit successfully at law.

2. EVIDENCE—*relevancy—in case of agreement for division of property between husband and wife—subsequent claim of alimony by the latter.* Where persons living together as husband and wife, separated, and agreed, in writing, for the division of their property, real and personal, in which contract the wife, upon receiving her portion, was to release the husband from all further claims for dower, it was *held*, on bill by the wife for the specific performance of the agreement and for partition, that proof offered by the defendant to show that the wife defended a suit brought by him for divorce, and claimed alimony, was properly rejected as irrelevant.

3. PARTITION—*by agreement—inequality of the division—estoppel.* Husband and wife agreed to divide a lot of ground so that the wife should receive one-third in value of the whole lot, and they each selected a third person, who made the division, which was satisfactory to them. In suit for partition the court confirmed this division, without regard to the exact value of the part set off to the wife: *Held*, that the husband, having acquiesced in the division as made, could not be heard to allege that the wife received more in value than one-third of the whole lot.

4. ERROR *will not always reverse—as to admission of evidence.* The admission of parol evidence which may vary or change the terms of a written contract, when the party introducing the same obtains no relief whatever on the contract, is an error working no harm, and no ground of reversal.

WRIT OF ERROR to the Circuit Court of Union county; the Hon. D. M. BROWNING, Judge, presiding.

This was a bill in chancery, by Julia Ann McDowell, against William McDowell and James W. Coleman, seeking to enjoin

the execution of a judgment in a forcible detainer case obtained by Coleman against complainant. The bill also prays for the partition of certain premises therein described, and for the conveyance by the plaintiff in error to defendant in error of a strip of land described in a certain bond for a deed, which bond is made an exhibit, and asked to be taken as a part of the bill.

The bill was filed June 16, 1882, two days after the rendition of the judgment in the forcible detainer case by the justice, and three days before the expiration of the time in which an appeal could have been legally taken. It sets out an illegal contract of marriage between the plaintiff and defendant, a subsequent discovery of the real facts which existed at the time of the consummation of such illegal contract, by the marriage of the plaintiff and defendant, their living and cohabiting together as husband and wife for some years after the discovery of such real facts, and their final separation, and division of their property and effects according to the terms of a certain written agreement mutually signed by them, which said written agreement is filed with the bill, and marked "Exhibit A," and asked to be made a part of complainant's bill; that by the terms of said contract the defendant in error was to have and retain as of dower one-third in value of a certain three-acre tract, etc., on which they then resided; that when the parties thus separated the plaintiff in error left the defendant in error in the possession of the house formerly occupied by them as a homestead, etc. It is further alleged that after the separation and division as aforesaid, the defendant in error purchased a strip of land ten (ninety-five) feet wide, etc., from plaintiff in error, which purchase is witnessed by a contract in writing marked "Exhibit B," filed with the bill and asked to be made a part of the same, and that the defendant in error has wholly failed to comply with the terms of said contract of purchase, but desires to do so now by bringing the money into court as the

court may decree, and prays that upon such compliance the plaintiff in error may be compelled to make, execute and deliver to her a deed, etc., to the said ten feet, etc.; also prays for partition and division. The bill then sets out the fact of the rendition of the justice's judgment in the action of forcible detainer, avers inability to take an appeal on account of poverty, and prays for an injunction, etc.

The plaintiff in error answered separately, alleging that at the time of his marriage with defendant in error she had a living husband; that she falsely and knowingly misrepresented the facts to him, by alleging that she had been legally divorced from Charles Daniels, her then living husband; denies that she ever said that said Daniels was dead, but claimed that she was divorced; that upon these false and fraudulent representations he married her, but denies that he had any knowledge of the fact that she was the lawful wife of another man; admits that he abandoned the said Julia Ann, but denies that it was by their mutual labor, etc., that his small property was accumulated, but charges the fact to be that the said Julia Ann was an invalid, etc., and her services of small value; that she had two small girl children, aged three and six years, respectively, at the time of his marriage with her, both of whom he reared and educated. Plaintiff in error further says that the division of property, etc., mentioned in exhibits "A" and "B" was agreed to by this defendant to avoid litigation, etc., and that in consideration thereof the complainant agreed to pay, etc., according to the terms as set out in "Exhibit B," and further, that she would cause him no unnecessary trouble or expense in a suit to dissolve the illegal marriage existing between them; that the complainant failed and refused to comply with the terms of said contract; that she notified this respondent that she would not pay anything on said contract, but that she would defend the divorce suit brought by him, claiming alimony, etc., and that she did defend said divorce proceeding; that she filed

her answer and cross-bill, claimed alimony, etc., compelled respondent to pay her attorney's fee of $25, etc., and that on a final hearing of said cause the equities were decided in favor of respondent, and the complainant therein was denied alimony.

The court found and decreed that complainant was owner in fee of eighty-five feet, etc., describing the same, and made the injunction perpetual as to it; found that complainant had not complied with the contract of purchase of September 20, 1879.

Mr. MATTHEW J. INSCORE, for the plaintiff in error:

If the complainant has any rights under either of the contracts set up, they are purely legal in their nature, and can be readily enforced in a court of law. Where a party has an adequate remedy at law, a court of equity will not interfere. *Smith* v. *Powell*, 50 Ill. 21; *Thomas* v. *Caldwell*, id. 139; *School Directors* v. *Miller*, 54 id. 338; *Winkler* v. *Winkler*, 40 id. 179; *Ohling* v. *Luitjens*, 32 id. 23; *Victor Scale Co.* v. *Shurtleff*, 81 id. 314; *Imperial Ins. Co.* v. *Gunning*, id. 236.

He who asks equity must do equity, and a party can not have a specific performance of a contract in equity, unless he can show that he has performed it in all its parts, or can show just excuse for non-performance; and the burden of proof is on the complainant to show his right to the relief he asks, by a clear preponderance of the evidence. *Brink* v. *Steadman*, 70 Ill. 241; *Walker* v. *Douglas*, id. 446; *Kimball* v. *Tooke*, id. 553.

Mr. M. C. CRAWFORD, and Mr. N. MAXEY, for the defendant in error:

This was a bill in chancery, filed by the defendant in error, against the plaintiff in error, for specific performance and partition, both of which are proper subjects of equitable jurisdiction.

The court denied the prayer for specific performance, but granted the partition, and the interest of defendant in error was set off to her by metes and bounds in severalty, and the decree conveys to her all the right, title and interests which the plaintiff in error had in and to the same. It is not necessary to cite authorities to prove that a court of chancery has this power.

Mr. Justice Craig delivered the opinion of the Court:

This was a bill in equity, brought by Julia Ann McDowell, for partition of a certain tract of land between herself and William McDowell, and also for specific performance of a contract providing for the conveyance of a certain other tract, which had been executed by the complainant, and defendant, William McDowell. The bill also prayed for an injunction to enjoin McDowell from taking possession of the premises claimed by complainant, under a writ issued or to be issued by a justice of the peace on a judgment in an action of forcible detainer which McDowell had prosecuted against complainant. The defendant, McDowell, put in an answer to the bill, and on the hearing, upon the pleadings and evidence, the court awarded a partition of the premises sought to be divided, and refused a specific performance of the contract set up in the bill. The defendant, McDowell, not being satisfied with the decree, sued out this writ of error.

It is claimed that if the complainant has any rights under the contract set up in the bill, they are purely legal, and may be enforced in a court of law. It may be true that complainant might have been able to defeat the action brought for possession of the premises, by relying on her contract on a trial in a court of law; but if she was entitled to the land under the written contract, she had a clear right to invoke the aid of a court of equity, and compel a division, or a deed for that portion of the property which she acquired under the

written contract. The complainant, under the allegations of her bill, sought a partition of premises which were held undivided between her and the defendant. She also prayed for the specific performance of a contract in writing, providing for the conveyance of the land. The rule that a court of equity has jurisdiction to grant relief in such cases, is too familiar to cite authorities in its support. It is quite true, as suggested, that where a party has an adequate remedy at law, a court of equity will not interfere; but that doctrine has no application to the facts of this case. Here the complainant and defendant, who had lived together as husband and wife for a number of years, agreed to separate, and entered into a written contract providing for a division of the three acres of land in controversy, and certain specified articles of personal property. One-third in value of the land, including the house, was to be set off to complainant. After this contract had been executed, the parties agreed upon two men to go upon and divide the land. In pursuance of this arrangement two men were selected, and they examined the property, agreed upon a division, and the defendant, as the evidence shows, was entirely satisfied with and assented to the division so made, and complainant was left in the possession of the land which it had thus been determined she should have.

These were some of the facts before the court which led to the decree enjoining the defendant from dispossessing complainant and vesting the title to the property in her, and the decree, in our judgment, was justified by the evidence. As no relief was granted in reference to the other tract of land, and no cross-errors have been assigned, it will not be necessary to spend any time in relation to that part of the relief claimed in the bill, although the matter is discussed in the argument of plaintiff in error.

It is also claimed that the court erred in admitting the evidence of the witnesses Buck and Williams, to vary the terms of the written contract (Exhibit "B.") No relief was granted

under this contract, and whether the evidence was competent or not is a matter of no consequence whatever.

It is also claimed that the court erred in rejecting evidence offered by the defendant to show complainant defended the bill for divorce brought by the defendant against her, and claimed alimony, and other evidence of a like character. We do not think this evidence had any bearing on the issue presented by this record, and for this reason, if for no other, the court did right in rejecting it. The contract under which complainant claims the land, provides that after receiving the property she shall release the defendant from all further claims for dower, but this is all. So far as any agreement was concerned she had a right to resist his suit for divorce, if she saw proper, and anything she did in that direction did not impair her rights under the written contract.

But it is said if the defendant was entitled to a decree in this cause for one-third in value of the whole lot, as prayed for in her bill, it was error in the court to decree her the fee simple title to the strip eighty-five feet wide on which the dwelling house stood, without ascertaining, by competent evidence, the value of the whole lot, and the relative value of the eighty-five foot strip. It appears from the evidence that the defendant was present when Buck and Williams divided the land between the parties, and expressed himself entirely satisfied with the division as made. The court, by the decree, followed and confirmed this division, which it was authorized to do by the evidence. In the division of the three-acre lot, if defendant saw proper to allow the complainant to have more in value than one-third of the lot, he could do so, and after the division was made with his sanction and approval, he will be bound by it, although she may have received a trifle more in value of the property than the contract specified she might receive.

It will be remembered that the complainant and the defendant were never legally married, as complainant, at the

date of the marriage, had a husband then living, so that no objection can be urged against the validity of the contract providing for a division of the property, on the ground that the contracting parties were husband and wife.

The decree of the circuit court will be affirmed.

Decree affirmed.

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JOHN O. SULLIVAN

v.

THE COMMISSIONERS OF HIGHWAYS.

Filed at Ottawa May 15, 1885.

1. COMMISSIONERS OF HIGHWAYS—*power to contract indebtedness.* The commissioners of highways have no authority of law to contract an indebtedness in respect to roads and bridges, when the money to pay the same is not in their treasury to be expended, or has not already been actually levied.

2. But where a tax has been levied by them, though the proceeds of such levy may have been intended by the commissioners to be applied in a way distinct from the making of a culvert, a party who builds a culvert for them under a contract, who has no notice that the levy was not made to pay for the same, and where there is nothing to afford notice of the purpose of the levy, may recover of the contract price a sum equal to such levy, and no more; and the fact that he was compelled to accept an order for the sum due, if such was not the agreement before the work was done, will not prevent a recovery upon an order not exceeding the tax levied for that year.

3. SAME—*power to contract to pay interest.* Where commissioners of highways contract for services and work in anticipation of taxes already levied, and give an order for payment, upon their treasurer, payable at a future day, they will have no power to agree to pay interest on the same; and if such order provides for interest, that part thereof may be treated as void, and only the principal can be recovered on such order.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Mr. JAMES W. DUNCAN, and Mr. H. T. GILBERT, for the plaintiff in error.

Mr. HENRY GUNN, and Mr. DANIEL EVANS, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought in the circuit court of La Salle county, by John O. Sullivan, against the commissioners of highways of the town of Deer Park, in La Salle county, upon the following order, executed and delivered by them to Fyffe & Hetherington, and assigned by the latter to the plaintiff, to-wit:

"$1000. The treasurer of the commissioners of highways of the town of Deer Park, La Salle county, State of Illinois, will pay to Fyffe & Hetherington, or order, the sum of one thousand dollars, ($1000,) with interest at ten per cent per annum, payable on or before the twentieth (20th) day of July, A. D. 1878.

"Dated at Deer Park, this 1st day of December, 1876."

The cause was submitted to the court for trial upon an agreed statement of facts. The circuit court found in favor of the plaintiff, and entered a judgment for $1446, which, upon appeal, was reversed by the Appellate Court for the Second District, and a judgment entered in favor of the defendants. The case comes here upon a writ of error to the Appellate Court.

It appears by the agreed statement of facts, that the order was given by the defendants to Fyffe & Hetherington for work done by the latter in the construction of a culvert upon a highway in the town of Deer Park. "The contract under which said work was performed by said Fyffe & Hetherington was entered into subsequent to the month of September, A. D. 1876, and the work thereunder was performed by said Fyffe

& Hetherington prior to the 1st of December, A. D. 1876, and the total amount of work performed by said Fyffe & Hetherington under said contract was worth the sum of one thousand seven hundred and eighty-three dollars and sixty-three cents, ($1783.63,) no part of which was ever paid by said defendants, but instead of making payment therefor in cash, said defendants issued to said Fyffe & Hetherington the order above mentioned, and a similar order for the sum of seven hundred and eighty-three dollars and sixty-three cents ($783.63.) At the time of the making of said contract with said Fyffe & Hetherington there was no money in the hands of said defendants, or their treasurer, belonging to the road and bridge funds of said town of Deer Park. The amount of the road and bridge tax levied in said town for said year 1876, (which levy was made in the month of September of said year,) was one thousand five hundred and sixty-six dollars, ($1566,) no part of which, however, had been collected at the time of the issuing of said orders. At the time of the making of said levy the defendants did not contemplate entering into any contract with Fyffe & Hetherington, or with any other person or persons, for the making of the culvert built by them, but they intended to use the funds so levied, for other road and bridge purposes. But there were no records, either of said town of Deer Park or of said county of La Salle, from which said Fyffe & Hetherington could have ascertained the purpose for which said funds, so levied, were to be used, nor did they, or the plaintiff, ever have any notice of the purpose for which said money was intended to be used."

The question presented is, whether, upon these facts, the original contract entered into under which the work was done, and the order issued to Fyffe & Hetherington, were null and void. The decision of the Appellate Court that they were, appears to have been rested upon the cases of *Commissioners of Highways* v. *Newell*, 80 Ill. 587, and *Brauns* v. *Town of Peoria*, 82 id. 11. In the latter case it was said: "We do not find,

in the very many provisions of the statute respecting roads and bridges, any authority conferred upon the highway commissioners to expend money on the roads and bridges within their respective districts, which is not in their treasury to be expended, and which had not been actually levied, nor is any authority conferred upon them to anticipate revenue and expend it, unless it be actually levied. It seems to be the policy of the law, and a very just one, that the accruing revenue of the year shall be appropriated to the wants of the year, and that no expenses should be incurred, in the absence of money already levied, to meet them." In the *Newell case* it was held that a tax having been levied by the commissioners of highways, they might enter into contracts, to be paid out of the funds derived from such levy.

These cases do not, in our opinion, go to the extent to deny power in the commissioners to contract for the doing of the work on the culvert which they did contract for in this case, and to require that the contract and order given should be held void. Prior to the making of the contract a tax levy for roads and bridges had been made, to the amount of $1566, and the cases cited admit the power, after having levied that tax, to make contracts for work on the highways to the extent of that levy. The mere intention of the commissioners, without any expression whatever of that intention, to use the tax levied, for other road and bridge purposes, we do not think should be of any avail as against the contract which was made. Regard should be had for those performing labor under the employment of public officers, as well as for the tax-payers. At the time of entering into this contract for the culvert, the contractors saw by the public records that a tax levy had been made. They were informed by decision of court that the commissioners might contract for the doing of work to the amount of the tax levied, and we think they were justified and are to be protected in entering into a contract for the doing of work to the amount of the tax which had been levied, they having

no notice that the money was intended to be used for any other purpose, and no means of so ascertaining from any public records. The contract was made, and the work done under it. When it came to paying for the work, instead of making payment therefor in cash, the defendants gave to the contractors the order in question, with one other. The orders are payable on or before July 20, 1878, but it does not appear that by the contract for the doing of the work these orders were to be taken. For aught that appears, the work should have been paid for at once, in money, but the contractors seem to have consented to take these time orders, bearing ten per cent interest. Of course, if the taking of such orders was not stipulated for by the original contract, the acceptance of them after the doing of the work should not affect the validity of the contract.

We are of opinion the contract, to the extent of $1566, (the amount of the tax levy,) should be treated as valid, and that the order sued on, being less than that amount, should be held valid. We do not mean by this to sustain the interest clause in the order. The circuit court seems to have allowed six per cent interest on it. The drift of decision by this court has been to strictly limit these highway commissioners in their power to impose burdens upon the tax-payers of their districts, confining them in their expenditures to moneys in the treasury, or such as had been provided for by an actual tax levy. In this restricted range of action there is no necessity for the issuing by the commissioners of interest-bearing obligations, and burdening tax-payers therewith, and we are of opinion the power to do so should not be admitted. We hold the interest provision of the order invalid in its whole extent.

The judgment of the Appellate Court is reversed and the cause remanded.

Judgment reversed.

JAMES P. SIDWELL

v.

MARY J. WHEATON.

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Filed at Ottawa June 13, 1885.

1. LIEN—*purchaser assuming incumbrance—of the lien created thereby in favor of the holder of the incumbrance.* The owner of a tract of land, after having given a deed of trust to secure an indebtedness of $800, in which he intended to include the same and other land, but in which the tract first mentioned was omitted by mistake, sold and conveyed the same by a deed containing a clause that it was subject to such trust deed and another one, describing the same and the date of their record, and then reciting that it was understood that the grantee, as a part of the consideration of his deed, assumed the payment of the several sums so secured by such trust deeds, with the interest, etc.: *Held*, that the reservation or assumption clause in the deed of conveyance was, in effect, the creation of an express lien, by contract, on the land conveyed, for a portion of the purchase money, in favor of the holders of the notes described in the trust deeds, which followed the land into the hands of all persons claiming under the grantee.

2. NOTICE *of lien as to prior incumbrance—by recitals in deed.* Where a vendor of land states in his deed that it is subject to an indebtedness of his, naming the amount and to whom it is owing, and that the grantee, as a part of the consideration of his deed, assumes the payment thereof, such deed will create an express lien or charge on the land for a distinct portion of the purchase money; and the recording of the same will be notice of such lien to all persons claiming under the grantee. Such a lien will have all the efficacy of a mortgage.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. T. H. GAULT, for the appellant:

A vendor's lien by reservation can, by apt words, be created in a deed of conveyance; but the recital necessary to create such a lien differs materially from that contained in the deed from Badeau to Lee, which is simply an assumption of the mortgage by Lee. 3 Pomeroy's Eq. Jur. sec. 1256. See,

also, *Heist* v. *Baker*, 49 Pa. St. 9; *Pugh* v. *Holt*, 47 Miss. 461; *Carr* v. *Holbrook*, 1 Mo. 240; *Sanford* v. *Smith*, 6 Bush, 129; *Hester* v. *Green*, 12 Wright, 96.

Messrs. DENT, BLACK & CRATTY BROS., for the appellee, contended that the clause in the deed as to the assumption of the debt secured by the trust deed, created a liability on the grantee to the incumbrancer, and a lien on the premises for its payment,—citing *Markoe* v. *Andras*, 67 Ill. 34; *Carpenter* v. *Mitchell*, 54 id. 126; 1 Hilliard on Mortgages, 473, 477, 486; *Blaisdell* v. *Smith*, 3 Bradw. 150; Washburn on Real Prop. 89.

The deed, with its recitals, when recorded, was notice of the lien to all subsequent purchasers. Story's Eq. Jur. 401; Washburn on Real Prop. 89; *Case* v. *Busteed*, 24 Ind. 426; *Melross* v. *Scott*, 18 id. 250. See, also, Jones on Mortgages, sec. 229; *Moore* v. *Lackey*, 53 Miss. 85; *White* v. *Downs*, 40 Texas, 226; *King* v. *Young Men's Association*, 1 Wood, 386; Pomeroy's Eq. Jur. secs. 1255, 1256.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was exhibited in the Superior Court by Mary J. Wheaton, in which she alleges the execution, in March, 1871, of a trust deed by William C. Badeau and wife to Joel D. Harvey, to secure the payment of a promissory note for $800, of which she is the assignee; that by mistake only a part of the land intended to be embraced in the trust deed was in fact included in it; that thereafter Badeau and wife conveyed the premises intended to be described in the trust deed, to George L. Lee, by the proper and correct description, and that in the *habendum* clause of the deed to Lee was inserted the following provision: "This conveyance is made subject to two certain trust deeds, as follows: one dated March 3, 1873, recorded in the recorder's office of Cook county,

Illinois, in book 210, page 363, made by William C. Badeau and wife to Lyman Baird, to secure his bond of even date therewith, conditioned for the payment of $800 on March 3, 1876, with interest at ten per cent per annum, payable half-yearly; and one other trust deed, dated March 4, 1871, recorded in said recorder's office in book 542, page 214, made by William C. Badeau and wife to Joel D. Harvey, to secure payment of the sum of $800,—it being understood that the party of the second part, as part of the consideration of this conveyance, assumes the payment of $1600, secured by said two trust deeds, with interest on $800 from March 3, 1873, and on $800 from March 4, 1872, at the rates therein specified." It is also alleged that through *mesne* conveyances the premises so conveyed to Lee came to defendant James P. Sidwell, who purchased *pendente lite*, and who was made a defendant on his own petition. The makers of the trust deeds and their grantees seem to have been made defendants, and all answered the bill except, perhaps, defendants Harvey and Lee, against whom defaults were entered. The court found the facts substantially as stated in the bill, and refused to correct the alleged mistake in the description of the premises in the trust deed given to secure the note held by complainant, but did decree that the conveyance by Badeau and wife to Lee, by reservation or clause of assumption, operated, in effect, as the creation of a lien or charge on the lands intended to be included in the trust deed in the nature of a mortgage for the payment of such indebtedness by Lee or his assigns in favor of his grantor, Badeau, and his assigns, and to the benefit and enforcement of which complainant is entitled. Defendant Sidwell excepted to the decision of the court, and prayed for an appeal to the Appellate Court for the First District, which was allowed, and it was thereupon stipulated, in substance, that only so much of the decision of the court as is last above stated should be assigned for error. The decision of the Superior Court was affirmed in the Appel-

late Court, and Sidwell brings the case to this court on his further appeal.

The decision of the Superior Court was clearly correct. The reservation or assumption clause in the deed from Badeau and wife to Lee is, in effect, the creation of an express lien, by contract, on the land conveyed, for a portion of the purchase money. It was expressed as positively and distinctly as it well could be,—"it being understood that the party of the second part, as a part of the consideration of this conveyance, assumes the payment of the sum of $1600." The reference to the trust deeds only makes the sums to be paid more definite, and indicates to whom the same were to be paid. The lien reserved for a distinct portion of the purchase money to be paid for the land appears from the record made of it in the proper book, and as all subsequent parties are chargeable with notice of what the record disclosed in the line of the title they were buying, the land in their hands is subject to the lien created by the deed. It is quite clear the deed from Badeau to Lee created, by express contract, a lien or charge upon the land itself for a distinct portion of the purchase money, which followed the land into whatsoever hands it passed, and had all the efficacy of a mortgage. The cases in this court that sustain this view of the law are numerous and consistent, and it will only be necessary to make reference to a few of them: *Carpenter* v. *Mitchell*, 54 Ill. 126; *Markoe* v. *Andras*, 67 id. 34.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

Syllabus.

THOMAS H. SMITH *et al.*

v.

CHARLOTTE LAATSCH *et al.*

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Filed at Mt. Vernon June 13, 1885.

1. EJECTMENT—*evidence—title from a common source.* In actions of ejectment, where both parties claim from a common source of title, the plaintiff will only be required to show a good and connected chain of title from the common source down to himself, to entitle him to recover. If the plaintiff shows the better title, though not altogether free from objections, he will be entitled to recover, unless a paramount outstanding title is shown in another.

2. Where the defendant files an affidavit denying that he claims title from the same source as the plaintiff, the latter may show that he does so claim, by introducing in evidence the various deeds connecting him with such alleged common source; and it is no objection to the exercise of this right that the evidence offered also proves the defendant's title to be worthless. If the defendant does not deny claiming under the source named, the plaintiff need not prove that fact.

3. It was not the purpose of the legislature, in adopting the 25th section of the Ejectment act of 1872, to hold the plaintiff absolutely bound by the denial of the defendant that the parties claimed from a common source, where a counter-affidavit is filed, and thereby cut off his common law right to show that the two chains of title did run back to a common source. The sole purpose of that section was to relieve the plaintiff, in cases of this kind, from the burden of proving the defendant's chain of title as well as his own, unless the defendant should deny, by counter-affidavit, that he claimed from the alleged common source, in which event the burden would still remain upon the plaintiff, just as it did before, of proving both chains of title, running back to a common source.

4. In this case the plaintiffs filed an affidavit that they and defendants claimed title under a common source,—the father of the plaintiffs. The defendants denied this fact, and stated that they claimed under a deed from A B to C D, and a deed from the latter, the defendants' deceased father. Plaintiffs, after proving their heirship, introduced in evidence a deed from the administrator of their father's estate, under a decree of the county court, to J. G., and a deed from him to A B, and a deed from A B to C D, and from C D to the defendants' father, made before his death, and also showed from the record that the administrator's sale and deed were void for want of jurisdiction in the court ordering the sale. This being all the evidence, the court found for the defendants: *Held*, that the plaintiffs were entitled to recover, and that the court erred in its finding and judgment.

5. STATUTE—*construction—so as not to conflict with the common law.* Statutes should be construed in reference to the principles of the common law; and it will not be presumed the legislature intended to make any innovation upon the common law further than the case absolutely requires, or further than that specified or clearly implied.

WRIT OF ERROR to the Circuit Court of Effingham county; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. JOHN M. LANSDEN, and Mr. ANGUS LEEK, for the plaintiffs in error:

If the plaintiff alleges a common source of title, and defendant denies it, as now provided for in the statute the parties are left just as they were before the 25th section of the statute was adopted. This section was not intended to increase the burden on the plaintiff in ejectment in any case. It simply provided for releasing him from a burden on condition of his making a certain statement under oath, very much as the plaintiff in an action for a money demand may file his affidavit of claim and relieve himself from other proof, unless the defendant shall plead under oath.

Where both parties claim under the same right, the plaintiff is not required to trace his title back beyond the common source. *Ferguson* v. *Miles*, 3 Gilm. 365; *McConnel* v. *Johnson*, 2 Scam. 528; *McClure* v. *Englehardt*, 17 Ill. 50; *Holbrook* v. *Brenner*, 31 id. 501; *Pollock* v. *Maison*, 41 id. 516; *Huls* v. *Buntin*, 47 id. 396.

Messrs. WOOD BROS., for the defendants in error:

The plaintiffs were required to go behind the source of title set up in their affidavit, as it was denied. *Hartshorn* v. *Dawson*, 79 Ill. 110; *Clark* v. *Day*, 93 id. 482.

Treating the declaration and affidavit of plaintiffs, and the plea and affidavit of defendants, as pleadings sworn to in the case at bar, it is evident that plaintiffs, to make out their case, must show a title in fee in Thomas H. Smith, their father. 2 Greenleaf on Evidence, sec. 309; Adams on Ejectment,

282; Tyler on Ejectment, 483; *Almond* v. *Bonnell*, 76 Ill. 539. This they might have done—

First—By showing a connected title from the United States, the ultimate source of title, to Smith. *Start* v. *Clegg*, 83 Ind. 85.

Second—As a *prima facie* title that their ancestor had possession of the premises, claiming it, by words or acts, as his own in fee. *Jenkins* v. *Pritchard*, 2 Wils. 45; *Barger* v. *Hobbs*, 67 Ill. 597; *DeWitt* v. *Bradbury*, 94 id. 448.

To enable a plaintiff to recover in an action of ejectment, he must, except in such instances as mortgagee, or grantor, or landlord, etc., show a prior possession or sufficient paper title. *Page* v. *O'Brien*, 36 Cal. 561; *Borrell* v. *Rawlings*, 30 id. 417.

It is only where both parties claim title from a common source, that it is unnecessary to prove title in that person. 2 Greenleaf on Evidence, sec. 307; *Horning* v. *Sweet*, 27 Minn. 279; *Mickey* v. *Stratton*, 5 Sawyer, 479; *Brown* v. *Brown*, 45 Mo. 415; *Gaines* v. *New Orleans*, 16 Wall. 715; *Ames* v. *Beckley*, 48 Vt. 102.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

Thomas H. Smith and Belle W. Sullivan, plaintiffs in error, on the 17th day of April, 1884, brought an action of ejectment, in the Effingham circuit court, against Charlotte and Ferdinand Laatsch, defendants in error, for the recovery of the east half of the south-west quarter of section 29, in township 7, north, range 4, east. The declaration was in the usual form, and the general issue, alone, pleaded. The cause, by agreement of parties, was tried by the court without a jury, resulting in a finding and judgment for the defendants, to reverse which the plaintiffs have brought this writ of error.

Before the commencement of the trial, plaintiffs filed in the cause an affidavit, setting forth that they claimed title to

the premises through a common source with the defendants,—namely, through Thomas H. Smith, deceased, the ancestor of the plaintiffs,—and also stating that the defendants claim title to the premises as purchasers under a sale of the same made by the administrator of the estate of the said Thomas H. Smith, deceased. The defendants thereupon filed in the cause an affidavit, stating that they claimed title to the premises from a source other than that mentioned in plaintiffs' affidavit,—that is to say, in the manner following: "First, by deed of William C. Wright and wife to Wilhelm Goers, dated April 21, 1866; second, by deed of Wilhelm Goers and wife to Christ Laatsch, of date February 12, 1874; third, by descent to the defendants in error, as widow and heir of the said Christ Laatsch; fourth, possession under said deeds as color of title acquired in good faith, and payment of all taxes on said premises for more than seven successive years prior to the commencement of this suit, by defendants in error and those under whom they claim." These affidavits were both read in evidence on the trial.

The plaintiffs, for the purpose of proving the issue on their part, introduced Thomas H. Smith as a witness, who testified that he was twenty-two years old on the 6th day of June, 1884; that Belle W. Sullivan was about twenty-seven years old; that she and witness were the only children and sole heirs at law of Thomas H. Smith, who was killed at the battle of Fort Donelson, in February, 1862. The plaintiffs then, for the purpose of showing the back links in the defendants' chain of conveyances, extending to and connecting with the title of the said Thomas H. Smith, deceased, and not specified in defendants' counter-affidavit, introduced in evidence the record of a proceeding commenced in the county court of Massac county, at its February term, 1865, by J. C. Willis, as administrator of the estate of the said Thomas H. Smith, deceased, to sell the south-west quarter of the section of land above mentioned, and of which the eighty-acre tract now in dispute is a part,

for the purpose of paying the debts of the estate; also, a deed for the premises from the said J. C. Willis, as such administrator, to John Gilbert, dated May 4, 1865; also, a power of attorney from Gilbert to Willis, dated 29th of June, 1865, empowering the latter to sell and convey the premises; and finally, the record of a deed from Gilbert and wife to William C. Wright, for said quarter section, executed by Willis, as attorney in fact of the said Gilbert and wife, bearing date July 18, 1865. Plaintiffs also put in evidence records of the several conveyances through which defendants claim, as specified in their counter-affidavit, thus showing a complete chain of conveyances from Thomas H. Smith, deceased, the common source of title, to the defendants. The defendants declining to offer any evidence, the cause was submitted to the court upon the facts above mentioned, with the result already stated.

By reason of a failure to obtain jurisdiction over the persons of the defendants in the proceedings had in the county court by Willis, as administrator, it is conceded the order of sale was void, and that consequently his deed conferred no title on the purchaser or those claiming through him. The question then arises whether, under the facts shown, the court ruled properly in holding, as it must have done, the plaintiffs were bound to show title in their deceased father from some legitimate source, in order to entitle them to recover.

The rule is firmly established, and has often been recognized by this court, that in actions of ejectment, where both parties claim from a common source of title, the plaintiff will only be required to show a good and connected chain of title from the common source down to himself, to entitle him to recover. (*McConnel* v. *Johnson*, 2 Scam. 522; *Ferguson* v. *Miles*, 3 Gilm. 365; *McClure* v. *Engelhardt*, 17 Ill. 50.) In such cases, if the plaintiff shows the better title as between himself and the defendant, although it may not be free from objections, he will nevertheless be entitled to recover, unless the defendant shows a paramount outstanding title in

another. 3 Wait's Actions and Defences, 16; *Holbrook* v. *Brenner*, 31 Ill. 501.

Prior to the adoption of the present statute regulating the practice in this class of cases, the plaintiff, in order to relieve himself from the burthen or danger, as the case might be, of deducing title from the government of the United States, or some other independent source of title, was bound to show not only his own claim of title back to the common source, but that of the defendants also, and if, upon this showing, the plaintiff appeared to have the better title, he would be entitled to recover, but not otherwise. The case of *Holbrook* v. *Brenner, supra*, well illustrates the rule and practice as they formerly existed. In that case, Holbrook, the plaintiff, treated Bostwick, assignee in bankruptcy of Campbell, as the common source of title. Prettyman, under whom Brenner held as tenant, was admitted to defend. The plaintiff, for the purpose of showing that Prettyman claimed through Bostwick, introduced a deed from the latter, as assignee, to Doolittle, for the premises, bearing date June 17, 1851; then a deed from the master in chancery, under a decree for the sale of the premises, against the heirs of Doolittle, to pay the debts of the deceased. Holbrook then offered a deed from Bostwick to himself, for the premises, dated October 18, 1850, which, as will be perceived, was from October till June older than the deed from Bostwick to Doolittle. The court rejected this deed on the ground, among other things, that it was not connected with any paramount source of title,—or, in other words, the court required plaintiff to show title in Bostwick before it would admit the deed. The plaintiff failing to do this, judgment was given for the defendant, which, on appeal, was reversed by this court on the ground the ruling of the circuit court in the respect stated was improper. In disposing of the case here, it is said: "The first objection to the deed as evidence was, that it was not, it is insisted, connected with a source of paramount title. On the contrary, it is urged that

the evidence showed that the parties claimed title from Bostwick as a common source. In the action of ejectment it is held that where both parties claim under the same right, the plaintiff is not required to trace his title back beyond the common source. When it is found defendant has purchased by deed, and is in possession of the premises, it is *prima facie* evidence that he claims under that title; and if he and plaintiff claim from the same source, it is not necessary for the latter to trace his title further in the first instance. When he exhibits a title from the same source, better than that of the defendant, it is sufficient to put him on his defence. The defendant may, however, show that he claims under a different title, or he may show a paramount outstanding title, to defeat a recovery. In this case it was sufficiently shown that both parties claimed from common source, to authorize the reading of the deed in evidence, and the court erred in excluding it from the jury."

In *Huls* v. *Buntin*, 47 Ill. 396, the evidence showed that Huls, the plaintiff, claimed the premises in dispute from one Shaw through his heirs, while the defendant claimed from him through his administrator, under a sale authorized by a decree of court. The plaintiff, to make out his own title, introduced a deed from Shaw's heirs to himself, and made proof of their heirship, and then, as was done in this case, introduced the record of the proceedings by the administratrix to sell the premises in controversy to pay debts, culminating in a deed by her to the defendant. This proof having been made, the plaintiff rested. The record of the proceedings by the administratrix to sell the land, showed, in that case, as it does in this, that the court failed to obtain jurisdiction of the defendant, and that consequently the administratrix's sale, and the deed founded thereon, conferred no title. This being developed, the defendant then set up the conveyance as color of title, only, and proceeded to make out a defence under the Limitation act of 1839. The plaintiff then offered to show

in rebuttal the minority of the heirs, but the court rejected the evidence because it was not offered in chief, and judgment was given for the defendant. The judgment was reversed by this court on the ground the evidence was improperly excluded. That case, in many of its features, is much like the case before us, and well illustrates both the law and former practice in cases of this kind. It will be observed all the plaintiff proposed to prove, in addition to what had been shown in chief, was the minority of the heirs. It is clear, therefore, if the evidence offered would not have changed the result,—or, in other words, entitle the plaintiff to recover without showing title in Shaw,—this court would not have reversed the judgment. The case also shows that for the purposes of the rule permitting the plaintiff to introduce evidence to prove the defendant claims from a common source of title with the plaintiff, it is no objection to the exercise of this right that the evidence offered also proves the defendant's title to be worthless. It was so in that case, as well as in the present.

It is clear, upon the authority of the cases cited, that under the law as it stood before the adoption of the 25th section of the Ejectment act of 1872, the plaintiffs in this case, upon the facts shown, were entitled to recover, and the only question now is, whether the common law is so modified by that section as to require a different result. That section is as follows: "If the plaintiff, or his agent or attorney, will state, on oath, upon the trial, that he claims title through a common source with the defendant, it shall be sufficient for him to show title from such common source, unless the defendant, or his agent or attorney, will deny, on oath, that he claims title through such source, or will swear that he claims title through some other source." Here, the defendants did swear that they claimed through some other source, and specified the chain of conveyances upon which they relied; but in their specification they did not, as the evidence abundantly demonstrates, disclose the source or beginning of the chain, and this the

plaintiffs did for them, thereby bringing the case within the rule as it existed before the statute.

The question then arises, was it the purpose of the legislature in adopting this section of the statute, to hold the plaintiff absolutely bound by the denial of the defendant, where a counter-affidavit is filed, and thereby cut off his common law right to show that the two chains of title run back to a common source? We think not. On the contrary, we are of opinion that the object, and sole object, of the legislature in its adoption, was to relieve the plaintiff, in cases of this kind, from the burden of proving the defendant's chain of title as well as his own, unless the defendant would deny, by counter-affidavit, that he claimed from the alleged common source of title, in which event the burden still remained upon the plaintiff, just as it did before, of proving both chains of title, running back to a common source. That the plaintiffs did in this case. To construe the statute otherwise would be to repeal, by mere implication, a rule of the common law of great convenience and highly promotive of justice. Courts never do this unless the implication is absolutely imperative. It is well said in Potter's Dwarris on Statutes, page 185: "As a rule of exposition, statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly announced, for if parliament had had that design, it is naturally said they would have expressed it." To give the statute the construction contended for, would be violative of the rule of construction here so clearly and forcibly laid down. Had the defendants offered evidence of possession and payment of taxes under their color of title, so as to make out a *prima facie* defence under the statute, as intimated in their affidavit they were able to do, the plaintiffs would

then, under the rule announced in *Huls* v. *Buntin*, *supra*, have had the right to show the minority of the plaintiffs, or any other legitimate matter, by way of reply, which, in law, would be a sufficient answer to the *prima facie* defence so made out. Suppose the plaintiffs in this case had filed no affidavit, but had gone on, according to the old practice, and proved, just as they did, the two chains of title terminating in Smith. It is clear, under the authorities cited, the plaintiffs, upon the facts proved, would have been entitled to judgment. This will not be denied. Surely, then, the filing of the conflicting affidavits by the parties (which do not tend to prove the case upon the merits, the one way or the other,) can not change the force and effect of the evidence before the court to such an extent as to require a wholly different judgment. The very statement of such a proposition demonstrates its unsoundness.

It follows from what we have said, the circuit court erred in finding for the defendants. The judgment will therefore be reversed, and the cause remanded for further proceedings in conformity with the views here expressed.

Judgment reversed.

JOHN D. KEDZIE *et al.*

v.

THE WEST CHICAGO PARK COMMISSIONERS.

Filed at Ottawa June 13, 1885.

114 280
152 404
154 219
114 280
167 334
114 280
171 152

1. PARK COMMISSIONERS—*power to levy special assessments.* The West Chicago Park Commissioners are a *quasi* public corporation for park purposes, and as such have the power to take steps to cause property benefited by the establishment of a boulevard, to be specially assessed for the cost of the same.

2. SAME—*effect of the act of 1873, as granting new powers, and of the mode of procedure under the several acts on the subject.* Section 12 of the act entitled "An act in regard to the completion, improvement and management of public parks and boulevards, and to provide a more efficient

remedy for the collection of delinquent assessments," approved May 2, 1873, relates to a new and entirely different subject matter not provided in the original act relating to the West Chicago Park Commissioners, and invests them with powers they did not before have.

3. The language of that section, to the effect that the cost and expense of acquiring title to land for a connecting boulevard or pleasure way "shall be levied upon, and collected by special assessment upon, the property deemed specially benefited by the location of such boulevard or pleasure way, in the same manner as the cost of other lands for parks and boulevards is assessed, under the several acts creating such boards," means that the same shall be done by and through the same agencies or instrumentalities as were provided in such former acts. Section 4 of the act of May 2, 1873, does not compel action in pursuance of its terms in a proceeding under section 12, and does not repeal section 13 of the act of February 27, 1869.

4. FORMER ADJUDICATION—*as to judgment of confirmation of special assessment.* Where a court has jurisdiction of the subject matter and the persons whose property is assessed, and power to adjudicate upon an application to confirm a special assessment, its judgment of confirmation will be conclusive upon all questions and objections that might have been interposed before judgment, and such questions can not be raised by a bill in chancery seeking to enjoin the collection of the assessment.

5. PLEADING IN CHANCERY—*allegation of want of notice of application for confirmation in a proceeding for special assessment.* An allegation in a bill seeking to enjoin proceedings for the collection of special assessments for park purposes, that "complainants are advised and believe, and therefore charge the fact to be, that no sufficient notice of the application for confirmation of said assessment was given," is but the statement of a conclusion of law. If a notice was given, the legality of which is denied, it should be specifically set out, that it may be seen whether it conforms with the requirement of the law.

APPEAL from the Circuit Court of Cook county; the Hon. T. A. MORAN, Judge, presiding.

Messrs. HUTCHINSON & LUFF, with whom were Messrs. JUDD & WHITEHOUSE, for the appellants:

The assessment is void, and the court had no jurisdiction to enter the order of confirmation, because the commissioners had no authority to make the assessment, which should have been made by the corporate authorities designated in section 4 of the act of May 2, 1873. Hurd's Stat. 1881, chap. 105, p. 772.

Section 4 of the act of May 2, 1873, provides, that the town supervisor, clerk and assessor of such town be and they are hereby designated and constituted the corporate authorities of such town, and they, or a majority of them, may levy the tax or any assessments herein authorized. It is under the 12th section of the same act that the park commissioners claim their authority to establish the boulevard. The commissioners having no authority to levy the assessment, it is void, and the court will enjoin. *McConkey* v. *Smith*, 73 Ill. 313; *Munson* v. *Miller*, 66 id. 380; *Bank of Shawneetown* v. *Cook*, 77 id. 622.

No action was ever taken by any official to ascertain whether the lands in West Chicago would be specially benefited to the amount of said assessment; and the assessment was not made according to benefits, but according to value, and is therefore in violation of the constitutional rule requiring uniformity of benefit and burden. *Greeley* v. *People*, 60 Ill. 19; *Crawford* v. *People*, 82 id. 557; *White* v. *People*, 94 id. 604; *Craw* v. *Tolono*, 96 id. 255; *Chicago* v. *Baer*, 41 id. 306; *Warren* v. *Grand Haven*, 30 Mich. 24; *Marsh* v. *Supervisors*, 42 Wis. 502; *Scofield* v. *Lansing*, 17 Mich. 437; 2 Desty on Taxation, 643.

The assessment being void, there was nothing to be confirmed by the circuit court, and appellants were not bound to appear and object to a confirmation. *Marsh* v. *Supervisors*, 42 Wis. 502; *Lyman* v. *People*, 2 Bradw. 289.

Equity will enjoin the collection of the assessment for want of authority to make the same. *Town of Lebanon* v. *Railroad Co.* 77 Ill. 539; *Bank* v. *Cook*, id. 622.

The assessment under consideration is in no sense a special assessment, and therefore was made without any authority of law, and the court will enjoin. *Nunda* v. *Chrystal Lake*, 79 Ill. 311; *Ramsey* v. *Hoeger*, 76 id. 432; *Kimball* v. *Trust Co.* 89 id. 611; 2 Desty on Taxation, 669; Pomeroy's Equity, secs. 260, 268-270, 273; *Scofield* v. *Lansing*, 17 Mich. 437.

Mr. GEORGE W. SMITH, and Mr. WILLIAM E. MASON, for the appellees:

This is a collateral attack upon a judgment at law of the circuit court. Therein it differs from the ordinary case of a bill to enjoin a tax in the course of collection. But even if there were no judgment, the bill fails to state a case of equitable cognizance. *DuPage County* v. *Jenks*, 65 Ill. 275; *Railroad Co.* v. *Johnson*, 108 id. 11.

The assessing authority is the board of park commissioners. Act of 1873, sec. 12; *Park Commissioners* v. *Telegraph Co.* 103 Ill. 103.

The word "may," in the 4th section, does not mean "must." *Kane* v. *Footh*, 70 Ill. 587.

The rule of section 12 must be followed. *Mix* v. *Rose*, 57 Ill. 121.

The assessment was not fraudulent. *Gage* v. *Evans*, 90 Ill. 569.

The rule as to the prevention of multiplicity of suits has no application. *DuPage County* v. *Jenks*, 65 Ill. 275.

Every question which the bill seeks to raise is *res judicata*. *People* v. *Brislin*, 80 Ill. 423; *Andrews* v. *People*, 84 id. 24; 83 id. 529; *Gage* v. *Parker*, 103 id. 528.

Per CURIAM: Circumstances that were unavoidable have prevented the preparation and filing of an opinion in this case at an earlier day. We are notified by counsel that longer delay in announcing a decision will be highly prejudicial to the rights of the parties, and at their earnest solicitation we have suspended the current business of the June term long enough to dispose of the case. But, in consequence of the many duties pressing upon us, arising from the holding of daily sessions, we are constrained to be content with announcing the conclusions we have reached upon the questions discussed in the arguments submitted, without setting forth, at length, the reasons which have induced those conclusions. We hold—

First—That the West Chicago Park Commissioners are a *quasi* municipal corporation for park purposes, and that they have power to take the steps to cause the property to be specially assessed for the cost of the boulevard, that were here taken by them.

Second—Section 12 of the act in regard to the completion, improvement and management of public parks and boulevards, and to provide a more efficient remedy for the collection of delinquent assessments, approved May 2, 1873, (Rev. Stat. 1874, p. 747,) relates to a new and entirely different subject matter,—one not provided for in the original act relating to the West Chicago park,—and invests the West Chicago Park Commissioners with a power they did not before have. The language therein, "and the cost and expense of acquiring title to such land shall be levied upon, and collected by special assessment upon, the property deemed specially benefited by the location of such boulevard or pleasure way, *in the same manner* as the cost of other lands for parks and boulevards is assessed, under the several acts creating such boards," means that the same shall be done *by and through the same* agencies or instrumentalities, and so, as applied to the present case, by and through the agencies or instrumentalities provided by section 13 of the act of February 27, 1869, creating these commissioners. We do not think section 4 of the act of May 2, 1873, compelled action in this proceeding pursuant to its terms, and we hold section 13, *supra*, unrepealed and in full force.

Third—We hold that the several steps taken in this special assessment anterior to the action of the circuit court, invested that court with jurisdiction in the proceeding, to reject, revise, amend or confirm the special assessment, in whole or in part, and to make or order a new assessment, in whole or in part, and to revise and confirm the same. The allegation in the bill that "complainants are advised and believe, and therefore charge the fact to be, that no legal or sufficient notice of the

application for confirmation of said assessment was given," is but the statement of a conclusion of law. If no notice was given, that is a fact, and should have been stated. But if a notice was given the legality of which is denied, a question of law is raised, and the notice given should be specifically set out, in order that it may be seen whether it conforms to the requirement of the law.

Fourth—Assuming, as we do, that on the application for confirmation the circuit court had jurisdiction both as respects the person and the subject matter, and hence had power to adjudicate, we hold that no question that could have been there raised can be heard upon bill in chancery to enjoin.

These conclusions lead to an affirmance of the decree below, which is accordingly adjudged.

Decree affirmed.

CHARLES LUCAN *et al.*

v.

J. H. CADWALLADER *et al.*

Filed at Ottawa September 21, 1885.

1. APPEAL—*whether a freehold is involved.* A bill to enjoin a defendant from rebuilding a mill-dam, and thereby prevent the overflowing of the complainant's land, etc., does not involve a freehold, so as to justify an appeal directly to this court from the trial court. A claim of an easement in the lands of another does not constitute a freehold in such lands.

2. SAME—*whether appeal will lie from order dissolving a temporary injunction.* The mere dissolution of a temporary injunction in vacation is not an order from which an appeal will lie in any case, as the injunction may be made perpetual on the final hearing.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. MCKENZIE & CALKINS, for the appellants.

Messrs. WILLIAMS, LAWRENCE & BANCROFT, for the appellees.

Per CURIAM: The appellants, who were plaintiffs below, filed a bill in the Knox circuit court, against the appellees, to enjoin them from rebuilding a mill-dam across Spoon river, in Knox county. It appears from the bill itself, that the original dam was built more than thirty years ago; that its construction and maintenance caused the river to overflow the lands of complainants, rendering them unfit for cultivation, and also, as is alleged, injuriously affecting the health of the people of the neighborhood, including complainants and their families; that the dam, with the attending results, was maintained until in February, 1884, when it gave way, and the waters of the river receded into their natural channel, etc. A temporary injunction having been awarded, the defendants entered a motion to dissolve the same, and by stipulation of parties it was heard, on affidavits, before the circuit judge, in vacation, resulting in an order dissolving the interlocutory injunction. From that order the complainants appealed to this court.

The appeal must be dismissed. The cause seems to have been brought here upon the hypothesis that a freehold is involved. This is a misapprehension. The defendants do not claim to have anything more than a mere easement in the lands of appellant, and it is well settled that does not constitute a freehold. But even if this objection were not in the way, this appeal was prematurely brought.

The appellants will be permitted to withdraw the record, abstracts and briefs, to make such use of them as they may be advised.

Appeal dismissed.

Syllabus.

JAMES A. JACKSON *et al.*

v.

EUGENE H. LAHEE, Receiver.

Filed at Ottawa June 13, 1885.

114 287
37a 461
114 287
140 558
40a 386
40a 662
41a 296
114 287
45a 51
114 287
d91a 296
114 287
93a 186

1. JUDGMENT LIEN—*as to property in the hands of a receiver.* The recovery of a judgment against partners after the appointment of a receiver to take charge of the firm assets for the benefit of the firm creditors generally, creates no lien against any property or funds of the firm in the hands of the receiver. Such property or funds can not be levied on by an execution, or reached by garnishment, for the reason of its being in the custody of the law.

2. RECEIVER—*how far assets in the hands of a receiver are beyond the control of the parties, or of creditors—and herein, of creditors obtaining priority over each other.* The possession of a receiver, as an officer of the court, is the custody of the law, and he holds the property or funds for the benefit of the party or parties whom the court shall find entitled thereto; and the law will not permit the receiver's possession to be disturbed, without the consent of the court that first obtained jurisdiction to appoint him.

3. Where a receiver has been appointed on a bill filed by one partner against his co-partner, merely to hold the property or funds pending the litigation between the parties, creditors of the firm are not bound to wait till the equities between the parties may be adjusted, as that might never be done. In such case the assets are treated as still belonging to the firm, and creditors may proceed in any lawful way to acquire a lien entitling them to priority over less diligent creditors.

4. A receiver was appointed on bill filed by one partner against the other for the settlement and adjustment of the partnership accounts and the payment of creditors of the firm, which was insolvent, and the court had ordered notice to be given to all creditors to come in and prove their debts before the master. It was *held*, that one of the creditors, by the recovery of a judgment against the firm during the pendency of said bill, and the filing of a creditor's bill on the same day that notice to creditors was ordered, did not acquire any lien upon the assets in the hands of the receiver, or right to be preferred over other creditors,—and this more especially when such creditor proved his claim before the master, and shared in the distribution of the funds in his hands.

5. And where, in such case, the defendant partner appeared, and consented to the appointment of a receiver, who took possession of all the effects of the firm, it was *held*, that this was equivalent to placing the assets of the firm, by the voluntary act of the parties, under the control of the court for the benefit

of their creditors, generally, and that after the court had assumed jurisdiction the parties would not have been allowed to dismiss the suit.

6. SAME—*estoppel of creditor to claim priority, inconsistently with former acts.* Where a creditor of a firm obtained judgment after the appointment of a receiver, on a bill between the partners, and proved his judgment before the master in pursuance of an order of the court authorizing the same, and filed his petition to prevent the partners from dismissing their suit and discharging the receiver, and contested other claims presented before the master, and received his *pro rata* share of a dividend ordered to be paid by the receiver, it was *held*, that these acts estopped such judgment creditor from claiming priority over other creditors in the final distribution of the assets.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Messrs. MONK & ELLIOTT, for the appellants:

A creditor, by obtaining a judgment and the filing a creditor's bill, acquires an equitable lien. The filing of the bill operates as an attachment of all property which can not be levied upon at law. *First National Bank* v. *Gage*, 93 Ill. 173; *Corning* v. *White*, 2 Paige's Ch. 567; *Weed* v. *Price*, 9 Cow. 928; *Edmeston* v. *Lyde*, 1 Paige, 639; *Eager* v. *Price*, 2 id. 333; *Clarkson* v. *DePeyster*, 3 id. 320; *Insurance Co.* v. *Power*, 3 id. 365.

As to what is the commencement of a suit as between the parties, see *Lowry* v. *Lawrence*, 1 Caine, 61; *Chatham* v. *Lewis*, 2 Johns. 42; *Fowler* v. *Sharp*, 15 id. 323; *Badger* v. *Finney*, 15 Mass. 859; *Harris* v. *Dennis*, 1 S. & R. 236; *Carpenter* v. *Butterfield*, 3 Johns. Ch. 145; *Hogan* v. *Cuyler*, 8 Conn. 203.

Under a bill filed by one partner against his co-partner for the adjustment of the partnership affairs between themselves, the appointment of a receiver by consent does not prevent a creditor from taking adverse proceedings, and thereby acquiring a lien. *Coates* v. *Cunningham*, 80 Ill. 467; *Howell* v. *Ripley*, 10 Paige, 43; *Burrill* v. *Leslie*, 6 id. 45; *Banks* v. *Potter*, 21 How. 467; *Waring* v. *Robinson*, 1 Hoff. Ch. 524; *Ellicott* v. *Insurance Co.* 7 Gill, 307; *Adams* v. *Hackett*, 7 Cal.

187; *Adams* v. *Wood*, 8 id. 152; *Adams* v. *Haskell*, 9 id. 24; *Ross* v. *Titsworth*, 37 N. J. Eq. 333; *Holmes* v. *McDowell*, 15 Hun, 585.

Appellants were not estopped from asserting their lien by accepting a *pro rata* distribution of the funds in the receiver's hands. *Lanahan* v. *Latrobe*, 7 Md. 278.

By their creditor's bill appellants acquired, not a right to a lien, nor a mere right to priority out of the general assets, but an actual, specific lien, which could only be defeated by satisfaction of the judgment or a successful defence of the suit. *Weed* v. *Price*, 9 Cow. 7; *Edmeston* v. *Lyde*, 1 Paige, 639; *Eager* v. *Price*, 2 id. 333; *Corning* v. *White*, 2 id. 567; *Clarkson* v. *DePeyster*, 3 id. 320; *Insurance Co.* v. *Power*, id. 365.

The assets of the firm are legal—not equitable—assets. Adams' Eq. *252, 254; 2 Leading Cases in Eq. pt. 1, p. 384.

Mr. I. K. BOYESON, for the appellee:

The appointment of a receiver placed the co-partnership property in the hands of the law, and no creditor could get a preference by obtaining a judgment subsequent to the appointment of the receiver. High on Receivers, 334, 345, 361; *Holmes* v. *McDowell*, 15 Hun, 585; 76 N. Y. 585; *Law* v. *Ford*, 2 Paige, 310; *Rutter* v. *Tallis*, 5 Sandf. 611; *Marr* v. *Bank*, 4 Cold. 471; *Van Alstine* v. *Cook*, 25 N. Y. 489.

The appointment of a receiver places the property *in custodia legis*. *Nicoll* v. *Boyd*, 90 N. Y. 519; *Temper* v. *Brooks*, 40 Mich. 333; *Maynard* v. *Bond*, 67 Mo. 315; Wait on Fraudulent Conveyance, 183, 261.

The title of the receiver relates back to the order appointing him. High on Receivers, 93; *Maynard* v. *Bond*, 67 Mo. 315; *Rutter* v. *Tallis*, 5 Sandf. 611; *Ex parte Evans*, L. R. Ch. Div. 260.

Appellants are estopped by proving under the receivership and participating in proceedings before the master. Bigelow

on Estoppel, 503; 2 Leading Cases in Eq. 139, 141; Am. Leading Cases, (1 Hare & Wall.) 556; *Rapallee* v. *Hewart*, 27 N. Y. 312; *Rodermund* v. *Clark*, 46 id. 354; *Howes* v. *Henriques*, 13 Wend. 243; *Irwin* v. *Tabb*, 17 S. & R. 419; *Adlum* v. *Yard*, 1 Rawle, 163; *Jones* v. *Norsey*, 4 Md. 306; *Lanahan* v. *Latrobe*, 7 id. 268.

The assets in the hands of the receiver being equitable assets, which appellants could only reach through a court of equity, they must pay the price of equitable assistance, which always is, that they share *pari passu*. *Silk* v. *Prine*, 2 L. C. in Eq. 358; *Purdy* v. *Doyle*, 1 Paige's Ch. 558; *Benton* v. *Le Roy*, 4 Johns. Ch. 651; *Washburn* v. *Bank*, 19 Vt. 278; *Jones* v. *Lackland*, 2 Gratt. 87.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

On the 26th day of April, 1883, Samuel H. Richardson filed a bill in the circuit court, against Truman B. Handy, in which it is alleged the partnership that had previously existed between them was not formed for any specified length of time; that the affairs of the firm had become disordered and embarrassed, and no longer profitable, and that complainant had elected to terminate the partnership; that various parties had instituted suits against complainant and defendant, and that there was danger of the firm assets being wasted by litigation; that the assets of the firm consisted mostly of open accounts and evidences of indebtedness, and office furniture. The prayer of the bill is for the appointment of a receiver to take charge of and collect and preserve the assets, that the cause be referred to a master to take an account between complainant and defendant, and that on final hearing a decree be entered according to the equities existing between complainant and defendant. On the same day, defendant, by stipulation in writing, entered his appearance in the court, waived service of process, and consented to the appointment of a

receiver, which was done. Afterwards, on the 31st day of May, 1883, on motion, the cause was referred to the master in chancery to take proof of all claims against the firm, and it was by the court ordered that all persons having claims against such firm should present the same before the master for allowance by a day fixed, and that the master give the usual notice to all creditors. Under this order the creditors,—among whom are the petitioners in this case,—came before the master and proved up their claims against the assets of the firm in the hands of the receiver. When the court made its order calling the creditors before the master, the receiver had previously collected, and had then in his hands, the sum of $20,274.31. That sum constituted most of the assets to be distributed. Since then a further sum, less than $5000, has been collected by the receiver. The usual steps were being taken as rapidly as was practicable to close up the partnership affairs and pay the creditors.

On the 5th day of May, 1883, petitioners commenced an action in assumpsit in the circuit court against the firm of Handy, Richardson & Co. Service was had on both defendants, and on the 23d day of the same month judgment was rendered against them by default, for the sum of $9052.12, on which execution was issued on the 25th of the same month, and placed in the hands of the sheriff. On the 29th day of the same month the sheriff made return on the execution, he had made demand on Richardson for property; that he failed or refused to deliver any in satisfaction of the execution; that Handy could not be found so that demand could be made on him, and that he made return of the execution by order of petitioners' attorney, which was as follows: "The sheriff will return the execution in the above case forthwith no property found, no part satisfied.—May 29, 1883." Two days thereafter,—that is, on the 31st day of May,—petitioners filed the usual creditors' bill, in which was set forth the recovery of their judgment against Richardson and Handy,

the issuing of the execution thereon, and the return of the sheriff no property found and no part satisfied, and concluding with the prayer that defendants may be required to answer, and for a discovery of property to be subjected to the payment of the execution. Service of process was had on Richardson on the same day the bill was filed, but Handy was not found. Richardson answered the bill, and disclaimed having any property subject to execution, and averred that he had turned over all his property to the receiver, and that no debts were due him or the firm other than those already in the hands of the receiver. Afterwards Handy was brought into court by publication, and nothing further seems to have been done in this case, except on the 13th of July an order was entered extending the receivership to this suit, and that assets in the hands of the receiver, or thereafter to be received by him, be held for the benefit of all parties to both suits, to be disposed of under the direction of the court.

Turning back, now, to learn what was done in the original suit, it is seen that on the 5th day of July, 1883, an order was entered granting leave to the present petitioners to file a petition praying that complainant and defendant in the original suit be not allowed to dismiss their suit, or the receiver be discharged. On the 6th day of the same month the time for filing claims before the master was extended to the August term, 1883, and it was ordered that the master mail notice to all persons appearing on the books of the firm to be creditors, and who had not then come forward and filed their claims. Other parties were allowed to file intervening petitions, and other orders were made, but it is not necessary to an understanding of the case to state them.

It appears from the report of the master, that divers claims were filed before him in June, 1883; that on the 29th day of the same month petitioners filed their claim before him, and for greater certainty referred to the judgments that had been previously obtained by them against the firm, and that in

the proceedings on proof of claims petitioners had taken an active part, and had contested a large number, but not all, the claims presented. It also appears that at the date of the filing of the original bill in this suit, Handy, Richardson & Co. were in fact insolvent, and that numerous creditors of the firm had commenced, and others were about to commence, suits against them. On the 28th day of January, 1884, petitioners were, by the court, granted leave to file their petition herein, instanter, in the original cause, for priority over other creditors participating in the assets in the hands of the receiver, which they did. In their petition they set forth the recovery of the judgment against the firm of Handy, Richardson & Co., the issuing of the execution on such judgment, and the return of the sheriff no part satisfied; that on the 31st day of May, 1883, they filed their creditors' bill, making both partners defendants; that service of process was duly had on Richardson, and the other defendant having ceased to be a resident of the State, service was had on him by publication; that in July, 1883, they filed with the master, to whom the reference had been made to take proof of claims, their claim, and made proof of the same; that they had received no part of it, and that it had been allowed by the master and approved by the court. It is further stated no decree was entered in the original cause declaring the partnership dissolved, or for an accounting, or for the application of the partnership assets to the partnership debts, until after the bringing of their creditors' bill, and not until after petitioners had asserted a priority to the assets in the receiver's hands, and had obtained an extension of the receivership to their creditors' suit. The prayer is, that petitioners' creditors' bill may be declared to have created a lien on all the assets of the firm, and to have entitled them to priority, to the extent of their judgment, over other creditors. The receiver, by his answer to this petition, admitted the commencement of the original suit April 26, 1883, in which

he was appointed receiver, and averred that in the bill it was alleged the estate was embarrassed; that the firm existed only during the pleasure of the parties; that complainant in the original bill elected to dissolve the partnership, and that on the 31st day of May, 1883, the cause was referred to a master to take proof of claim, and thereafter a decree was entered declaring the firm insolvent, and the receiver insisted such decree relates back to the date of his appointment.

It is on the claim made for priority of payment of petitioners' judgment out of funds in the hands of the receiver, to the exclusion of other equally meritorious creditors of the failing debtors, that the controversy in this case arises. It will be noticed it is not claimed petitioners acquired any lien on the firm assets by the commencement and prosecution of the action at law against the debtor firm; but if such lien were insisted on, it is obvious it would have nothing in its support. Neither partner had any property subject to execution, nor did the firm have any assets other than what were in the hands of the receiver. It is plain the funds could not be levied on by an execution at law, nor could the same be reached by garnishment in the hands of the receiver, for the simple reason the assets were *in custodia legis*. It is only insisted petitioners' creditors' bill shall be declared to have created a lien on all the assets of the firm, and to have entitled them to priority of payment of their judgment against the firm debtors over their other creditors. On what principle consistent with equity and good conscience this can be done, is not readily perceived. It is certainly not upon the principle a diligent creditor is rewarded for his superior diligence in discovering assets that would not otherwise have been brought to light. There can be no pretence in this case that petitioners filed their creditors' bill with a view to discover assets other than those in the hands of the receiver. It is inconceivable the bill in this case was exhibited with any hope or expectation, founded in good faith, other assets

would be discovered. It would be absurd to claim that funds in the hands of a receiver, to be administered under the direction of the court, could be discovered, in the sense that term is used in the books, for which a creditor should be rewarded as for superior diligence. If the bill in this case is to be sustained at all, it must be upon some other ground, and for some other reason.

It is conceded the funds in this case were in the hands of a receiver when petitioners filed their creditors' bill, and that the same were not subject to levy at law. The receiver is a mere officer of the court, and his possession is the custody of the law. The property or funds were in the hands of the receiver for the benefit of the party ultimately entitled to them, and when he is discovered or ascertained, the receiver will be considered his receiver. The law will not permit that possession to be disturbed without the consent of the court that first obtained jurisdiction to appoint the receiver. It would seem an anomaly that a lien adverse to the rights of the receiver could be obtained, so as to control the distribution to be made. Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and if that could be done in this case it would withdraw the same from the custody of the law, or from, what is the same thing, the custody of the receiver having the same in possession. There are cases that seem to hold something akin to this may be done, but they are mostly cases where the receiver has been appointed on a bill filed by one partner against his co-partner, and where the receiver is appointed to hold the property or funds pending such litigation. In such cases creditors are not bound to wait until the equities between the parties may be adjusted. That might never be done, or the proceeding might be dismissed and the receiver discharged. The assets in such cases are treated as still belonging to the firm, and the creditors may proceed in any way that may lawfully be done to acquire a lien, which would no doubt entitle them to

priority over less diligent creditors. The cases are rare that permit this practice. The better rule is, as stated in *Waring* v. *Robinson*, 1 Hoff. Ch. 524, that although it is in the power of the partner who has filed such a bill, to dismiss it at any time before decree, and probably discharge the receiver, yet until he does so it must be treated as an equitable assignment of the property for all the creditors. The same general doctrine was declared in *Holmes* v. *McDowell*, 15 Hun, 585, which case was afterwards affirmed in 76 N. Y. 596, on the grounds stated in the prevailing opinion of the judges concurring. That was a case commenced by one partner against his co-partner to adjust the affairs of the partnership, which was insolvent, and to distribute the assets equally among their creditors, and where a receiver was appointed by stipulation. After that suit was instituted and the receiver appointed, and during the pendency of the suit, other actions were brought against the firm by other creditors, and judgments recovered. Afterwards, in supplementary proceedings, the receivership was extended to the latter actions, and on the application of the plaintiffs in the creditors' action, to have the receiver directed to pay their claims out of the assets in his hands, it was decided the judgments recovered by the plaintiffs gave them no priority over other creditors. The decision proceeds on the theory that that which was done by the partners in causing the receiver to be appointed, was, in effect, an assignment of the partnership assets for the benefit of their creditors, to be administered by the court, or under its direction; that the owners of the partnership property had, by their voluntary act, placed it in the hands of the court for equal distribution, and that the court had assumed jurisdiction over it for that purpose. This doctrine finds support in the principles declared in the following cases, although not so definitely stated: *Law* v. *Ford*, 2 Paige, 310; *Van Alstine* v. *Cook*, 25 N. Y. 489; *Maynard* v. *Bond*, 65 Mo. 315.

In *Ross* v. *Titsworth*, 37 N. J. Eq. 333, it was ruled that where creditors recovered judgments against partners after the filing of a bill by one partner against the other for settlement of the co-partnership, and obtained execution thereon before any decree of dissolution and call for creditors, though after the appointment of a receiver by consent, they were entitled to the benefit of their liens. So in *Ellicott* v. *United States Ins. Co.* 7 Gill, (Md.) 307, it was declared that where the decree appointing a receiver and awarding an injunction did not state the ulterior intent of the court was to make an equitable distribution of the fund, and contained no direction to the receiver to give notice to the creditors to file their claims, such decree imposed no restriction upon creditors in prosecuting their claims, either at law or in equity, and a judgment thereafter obtained by a creditor was as much a lien on the real estate of defendant as if the appointment of a receiver had never been made. But if the court had stated in its decree the object of placing the effects of defendants in the hands of the receiver to have been that it might make an equitable distribution among creditors, and had directed the usual notice to creditors to come in and file their claims, then it was said creditors commencing a suit at law might be enjoined from prosecuting it; and if no such application was made by any one interested, the court would regard the judgment, if obtained, as an unwarrantable interference with the jurisdiction it had assumed, and rejected it as a lien on the property in the hands of the receiver. In *Adams* v. *Hackett*, 7 Cal. 187, one of the concurring judges held, in a case where one partner has filed a bill for a dissolution of the partnership and the appointment of a receiver, that until a dissolution has been pronounced by the court, and an order upon the receiver to make an equal distribution of the assets among creditors, a creditor is not prevented from resorting to adverse proceedings, and in that way obtain preference, while the other concurring judge was of opinion a fund in the

possession of the receiver can only be distributed by order of the court in whose custody it is, and no party can, by an adverse proceeding, acquire a lien on such funds. In *Adams* v. *Wood*, 8 Cal. 152, it was decided, among other things, a bill for a dissolution of a partnership and the appointment of a receiver can not operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, for the reason all such assignments, excepting in insolvency, were void under a statute of that State. The case of *Adams* v. *Wood*, 9 Cal. 24, seems to follow the decision of *Adams* v. *Wood*, last above cited, and is based definitely upon a statute of that State, which provides: "No assignment of any insolvent debtor, otherwise than is provided in this act, shall be legal or binding on creditors."

It will thus be seen from this brief reference to cases, the present case is not within the principle of the strongest case in support of the position taken by petitioners. The utmost petitioners could claim, in any event, would be, they might, at any time before the creditors should be called, acquire a lien, by judgment at law or decree in chancery, which would give them a priority in the distribution of the assets in the hands of the receiver. Without conceding the position taken has the weight of authority or even any equitable consideration for its support, it may be said the case being considered can hardly be brought under the control of the principle insisted upon. It is conceded petitioners' judgment at law against the partners gave them no lien upon the funds in the hands of the receiver. Did the filing of the creditor's bill give them any such lien as will be recognized in equity? Applying the strictest rules stated in any of the cases cited, no case is made that would entitle petitioners to priority over other creditors. It does not appear their creditors' bill was filed before the creditors were called to go before the master to establish their claims. The order calling the creditors was entered on the 31st day of May, and the petitioners' creditors'

bill was filed on the same day, but which was first, in fact, in order of time, does not appear. The burden of showing facts which would give petitioners priority over other creditors, must, of course, devolve on them, otherwise the claim put forth by them fails. Their creditors' bill was filed in the same court where the proceedings to sequester the assets of the debtor firm were pending, and it is not unreasonable to charge petitioners with notice of what was being done in that case in the same court. It was for them to show that, when their creditors' bill was filed, the court had entered no order directing the creditors to be called before the master to establish their claims. That they have not done. Where substantial justice requires it, courts will inquire when any particular act transpired,—as, for instance, the precise hour when a statute took effect, or when it received the executive approval. If their creditors' bill was, in fact, filed before the court made the order calling the creditors, that fact should have been made to appear from the evidence. No presumption will be indulged that would give petitioners an advantage over other equally meritorious creditors.

It is said that at the time petitioners exhibited their creditors' bill, the partnership affairs were still under the control of the partners, and that they could reconcile their differences and dismiss the suit, and with it, the receiver. That proposition is certainly not correct under any view of the law, unless it appears the creditors' bill was filed before the court directed the receiver to notify creditors to appear before the master and establish their respective claims. It is a matter of no consequence the order may not have been spread at large on the records of the court by the action of the clerk until the next day after it was made. It had been made by the court, and minuted on the record, and that was sufficient. After the entry of that order, it is apprehended the court would not have permitted the partners to dismiss their suit. It had then progressed too far. Creditors had

interests the court had assumed to protect, and its equitable purpose in that regard could not be defeated by the partners. After the entry of that order calling the creditors before the master to whom the cause had been referred, any attempt to enforce payment out of the funds in the hands of the receiver, of any judgment or decree subsequently obtained, would have been deemed an unwarrantable interference with the jurisdiction the court had assumed to exercise, and the priority insisted upon under any such pretended lien would have been rejected. The original bill filed by one partner represented to the court the affairs of the firm had become disordered and embarrassed, that various parties had instituted suits against the firm, and that there was danger of the assets being wasted by litigation, and asked the court to appoint a receiver according to the practice in such cases. The other partner came in and consented to the appointment of a receiver, which was done. That was equivalent to placing the assets of the firm, by the voluntary act of the parties, under the control of the court for the benefit of their creditors. The court had taken jurisdiction, and was moving as fast as was practicable, to close up the partnership matter, and distribute the assets to whomsoever they should appear to belong. In a little more than one month from the time the bill was filed, the court had both partners before it, and had so far progressed as to refer the cause to the master, and to direct notice to be given to all creditors to come before him to make proof of their claims. After all this was done—for it does not appear the creditors' bill was filed before the general creditors were called—it would be inequitable to permit petitioners to obtain priority over other creditors simply by the filing of a creditors' bill, when it was apparent the court was proceeding with all convenient speed to make a distribution of the assets in the hands of its receiver, among the creditors. The haste with which the creditors' bill was filed after the judgment at law was obtained, would seem to

indicate it was a mere contrivance to be used to secure priority over other creditors, to the assets the court had assumed jurisdiction to distribute, and which it was proceeding to do. Equity will not lend petitioners its aid to accomplish any such result, and without such aid the pretended lien could never be made available.

But aside from this view, petitioners came in with other creditors and proved their claim before the master, and contested claims of other creditors. This could only be done by parties entitled to share in the final distribution to be made, otherwise it would have been mere officious intermeddling. Shortly after the court had referred the cause to the master to take proofs of claims, petitioners obtained leave of the court to file a petition to prevent the partners from dismissing their suit and discharging the receiver. This may have been, and perhaps was, unnecessary at that stage of the proceedings, but it tends to show petitioners had submitted to the jurisdiction of the court in the matter of the distribution. The sequel shows that when a dividend was ordered to be paid by the receiver, petitioners received their *pro rata* share. These are considerations that ought to have estopped them from claiming priority over other creditors in the final distribution of the assets. Had they intended to insist on the priority obtained by filing their creditors' bill, there was no occasion for intermeddling with the proceedings before the master, causing large expenses, which could only be paid out of the only fund available for the payment of their claims.

In no view that can be taken are petitioners entitled to priority over other creditors, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

DANIEL IRWIN *et al.*

v.

SARAH DYKE *et al.*

Filed at Springfield June 12, 1885.

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SPECIFIC PERFORMANCE—*parol gift of land by a father to his son.* In this case the facts established were considered sufficient to bring it within the rule, that where a father makes a verbal agreement with a son to convey to him a tract of land if the latter will go and live upon the same, make expenditures upon and improve it, and this is done in reliance upon the promise, a court of equity will enforce the specific performance of the agreement.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

This was a bill for partition of a certain two hundred acres of land, described in the bill filed October 21, 1881, by Daniel Irwin, and Narcissa Irwin, his wife, setting out that Daniel Irwin was the owner in fee of the undivided half of the land, and that Lewis M. Dyke and said Narcissa Irwin, the only children and heirs at law of Benjamin Dyke, deceased, were the owners in fee of the other undivided half of the land, and praying partition accordingly. The answer of Lewis M. Dyke admits the interest of Daniel Irwin as alleged, and that Benjamin Dyke, at the time of his death, held the legal title to the one undivided half of the land, but that it was in trust for him, Lewis M. Dyke, who was the equitable owner thereof. The answer alleges that from January, 1875, until February, 1879, Lewis M. Dyke and his wife lived at the house of Benjamin Dyke, and, during all that time, worked for him with the horses and farm machinery of said Lewis M., without ever having received any pay therefor, except through said land; that at the time said Lewis M. went to live with said Benjamin, it was under an agreement between them that if the former would come and live with the latter, said

Benjamin would buy a farm, as soon as he got able, for said Lewis M., which the latter should have, and that it was upon that inducement and promise said services were rendered; that about January 1, 1879, the said Benjamin Dyke and Daniel Irwin purchased the land described in the bill; that in pursuance of said agreement, Benjamin Dyke placed the said Lewis M. in possession of the land, and the land was by the said Benjamin, up to the time of his death, treated, in all respects, as the land of the said Lewis M., but was not deeded to him; that soon after the purchase of the land, Lewis M. and Daniel Irwin partitioned the land between them, by verbal agreement; that the said Lewis M. took possession of his part, and has been in possession ever since, and has put considerable improvement on the same, and has paid about $1200 on the notes given by Benjamin Dyke for the purchase of the land. A cross-bill was filed by Lewis M. Dyke, setting forth the same facts stated in his answer, and praying that the verbal partition of the land between them, made by the said Daniel Irwin and Lewis M., be confirmed, and that the said Irwin and Narcissa Irwin make to the said Lewis M. a deed for his portion of the land. Replications were filed to the answers to the original and cross-bills, and proofs taken, and, on final hearing, the court decreed relief in accordance with the prayer of the cross-bill, and the complainants appealed to this court.

Mr. J. S. NEVILLE, for the appellants:

The mere possession of land under a parol agreement to convey, even with the superadded fact of valuable improvements, will not be deemed sufficient if the possession was obtained otherwise than under the contract. *Padfield* v. *Padfield*, 92 Ill. 198.

To entitle a party to specific performance, the proof must be clear, and it must also be fair, and it must be proved as laid, and not otherwise. *Hatwell* v. *Black*, 48 Ill. 301.

Where a contract for the sale of land rests in parol, it must clearly appear that the contract of sale has been made. Its terms must be clearly proved, and it must appear that they have been relied on and performed by the party seeking the enforcement of the contract, in order to entitle him to a decree for specific performance. *Gosse* v. *Jones*, 73 Ill. 508.

A court of equity, when called on to decree a specific performance of an alleged parol agreement, is asked to exercise an extraordinary jurisdiction. The court must be well satisfied of the existence and character of the agreement, and will always look to the substantial justice of the case. It must be satisfied that any resistance to the completion of the agreement alleged and proved, would operate as a fraud upon the other party. *Selton* v. *Shipp*, 65 Mo. 297.

The act relied upon as a part of performance, must, in itself, furnish evidence of the identity of the contract, and it is not enough that it is evidence of some agreement, but it must relate to and be equitable evidence of the particular agreement charged in the bill. *Wallace* v. *Rappleye*, 103 Ill. 229.

Messrs. FIFER & PHILLIPS, for the appellees:

This court has repeatedly held, that where a father gives land to his son by parol, and the son moves upon the land and makes thereon valuable improvements, the father retaining the legal title in himself, the contract stands upon the same basis as a bargain and sale for a valuable consideration, and equity will compel a conveyance of the legal title. *Smith* v. *Yocum*, 110 Ill. 142; *Warren* v. *Warren*, 105 id. 568; *McDowell* v. *Lucas*, 97 id. 489; *Bohanan* v. *Bohanan*, 96 id. 591; *Langston* v. *Bates*, 84 id. 524; *Kurtz* v. *Hibner*, 55 id. 514; *Bright* v. *Bright*, 41 id. 97; *Ramsey* v. *Liston*, 25 id. 98.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The Statute of Frauds was not set up in the pleadings, which was necessary to be done in order to avail of that statute.

The proofs quite well establish that Lewis M. Dyke, in August, 1873, soon after he became twenty-one years of age, married, and lived with his parents until in the following spring, when he moved to Blue Mound, and went to farming on his own account. His father, Benjamin Dyke, and his mother, Sarah Dyke, were living on a rented farm, called the "Davis farm," and seem to have been both in feeble health. Benjamin Dyke proposed to his son, Lewis M., that if the latter would come back to the Davis farm, they would work together, and as soon as they got money enough they would buy a farm, and it should be Lewis'. Lewis Dyke thereupon left Blue Mound, where he had been about one year, and, together with his wife, moved back to the Davis farm, where he remained with his father and mother some four years, his wife doing the house-work, and he working on the farm. In the fall of 1878, Benjamin Dyke and Daniel Irwin purchased the two hundred acres of land described in the bill, taking a deed to themselves, jointly. The purchase price of the land was $7000, of which each was to pay one-half. They made a cash payment of $4000, including two assumed incumbrances of $900, and gave their three promissory notes, of $1000 each, due in one, two and three years, respectively. In the spring of 1879, Daniel Irwin and Lewis Dyke took possession by moving upon the land. They made a division of the land between them, and have, from that time down to the present, continued to occupy and cultivate the lands so set apart between them, in severalty. Benjamin Dyke remained on the Davis farm, and died September 19, 1880. Of the purchase money which remained unpaid at the time of the purchase, Lewis Dyke has paid some $1200, a part thereof ($519) having been paid previous to the death

of Benjamin Dyke, and by the decree Lewis Dyke is to pay the balance of $500 remaining unpaid on the last of the three purchase money notes given by Benjamin Dyke and Daniel Irwin. After the purchase of the land, Benjamin Dyke treated the land as belonging to Lewis Dyke, often saying that he bought it for Lewis, and that it was Lewis' land. Although it does appear that on two occasions he expressed an intimation that he might not let Lewis have the land, this is of little weight against the greatly preponderating evidence of the contrary intention. Lewis Dyke made some small improvements upon the land, putting up a smoke-house about ten feet square, and a granary about five by ten feet, as one witness says, or as he says, ten by sixteen feet, and making some little fence.

On two or three occasions, Benjamin Dyke spoke of Lewis having four years' work in the land, thereby recognizing that the purchase of the land was for Lewis in fulfillment of the agreement to buy a farm for the latter, and under which he came to live with his father and performed the services he did for him. It may be said, then, that it was on the faith of the agreement that he should have the land, that Lewis Dyke rendered the services which he did for his father, moved upon and lived on the land, making some improvements, and paid a considerable portion of the purchase money which his father agreed to pay for the land,—as much as $1200 of it. We think this brings the case within the rule of repeated decisions of this court, that where a father makes a verbal agreement with a son to convey to him a tract of land if the latter will go and live upon the same, make expenditures upon and improve it, and this is done in reliance upon the promise, a court of equity will enforce a specific performance of the agreement. *Bright* v. *Bright*, 41 Ill. 97; *Kurtz* v. *Hibner*, 55 id. 514; *Langston* v. *Bates*, 84 id. 524; *Bohanan* v. *Bohanan*, 96 id. 591; *McDowell* v. *Lucas*, 97 id. 489; *Warren* v. *Warren*, 105 id. 568; *Smith* v. *Yocum*, 110 id. 142.

The decree will be affirmed.

Decree affirmed.

Mr. JUSTICE SCOTT, dissenting:

Dissenting as I do from the opinion of the majority of the court, I wish to state my views of the case at some length.

The case was before this court at a former term, and was reported in 109 Ill. 528. A statement of the object of the bill and of the principal facts appears in the opinion then delivered. The former decree was reversed because the court granted defendant Lewis M. Dyke affirmative relief on his answer, without the filing of a cross-bill. In reference to the merits of the case it was then said: "As the decree is now to be reversed for another cause, the sufficiency of the evidence to sustain the claim of ownership put forth by Lewis M. Dyke to the entire one hundred acres of which the intestate in his lifetime held a legal title, will not now be discussed further than to say the evidence is not of the most satisfactory character. It leaves on the mind very grave doubts, if the contract between the father and son was as it is alleged in the answer to be, whether it could have been enforced against the father in his lifetime; and if it could not have been enforced against him, it certainly could not be enforced against his heirs since his death. The daughter ought not to be divested of her inheritance except upon the clearest and most satisfactory evidence." Since then, Lewis Dyke has filed a cross-bill, in which is set forth the principal fact contained in his original answer, upon which he expects the relief that had been given to him by a former decree.

It seems to be conceded now, as it was on the former hearing, the verbal partition of the lands was fairly made, and no objection is interposed to having it confirmed as was done by the decree. Some complaint is now urged, as was done before, to the decree so far as it assumes to adjust the equities between the parties in interest as to payments made and to be made. It will not be necessary now to consider this branch of the case. The principal contention now is as to whether partition of the one hundred acres of which Benjamin Dyke

died seized, shall be made between his son and daughter, who constitute his only heirs at law, or whether Lewis M. Dyke shall have a decree on his cross-bill for a deed of the land to himself, from the defendants to his bill.

The allegations of the cross-bill upon which Lewis M. Dyke claims title to one-half of the premises which are sought to be partitioned by the original bill, are, that although Benjamin Dyke held the legal title to the premises, he was not the real and equitable owner, but held such title in trust for complainant in the cross-bill, who, it is averred, is the real and equitable owner of an undivided one-half interest in the premises described in the original bill; that during a period of more than five years, viz., from January, 1875, to February, 1879, he lived at the house of Benjamin Dyke, and during that time did farm work and had the care and control of his business, and also employed in the service of Benjamin Dyke several of his own horses and a large amount of farm machinery, and for such services rendered he never received any pay; that as an inducement to complainant to undertake such services, as above mentioned, Benjamin Dyke, on or about the first day of December, 1874, promised and agreed with complainant to buy a farm as soon as he was able, and that complainant should have it, and complainant avers, that, relying upon such promise and agreement of Benjamin Dyke, he went and lived with him, and worked for him, as above stated, and for no other consideration or reason whatever, and that in pursuance of such agreement, Benjamin Dyke, about the first day of January, 1879, with Daniel Irwin, one of the complainants in the original bill, purchased the land sought to be partitioned by the original bill, and that the deed was made to them jointly; that as soon as such land was purchased, Benjamin Dyke placed complainant in possession of his share of the land, and ever since which time, viz., February 24, 1879, he has been in possession and occupancy of the same, and that Benjamin Dyke treated the land in

all respects as belonging to and as the property of complainant in the cross-bill, though for some reason he neglected to make a deed to him. It is also alleged in the cross-bill, that Daniel Irwin, one of complainants in the original bill, and Lewis M. Dyke, soon after the land was purchased, made a division of it, and since then Irwin has in all respects recognized and treated complainant as the owner; but, obviously, what Irwin may have done is a matter of no consequence, as he himself had no interest in that part of the land, and no unauthorized acts of his could bar his wife's rights, whatever they may have been. It is also alleged, that during his occupancy complainant has made considerable improvements on the land, and paid notes given for the land to the amount of $1200, making such payments on the faith of the agreement that he was to have the land, as above set forth. The prayer of the cross-bill is, that the agreement alleged to have been made with Benjamin Dyke be declared valid, that defendants in the cross-bill may be bound by the division made of the land, and that Daniel Irwin and Narcissa Irwin be required to make complainant a deed for that part of the land claimed by him under the alleged agreement with Benjamin Dyke. Defendants answering, deny many of the principal allegations of the cross-bill, and then pray for the same advantage of their answer as if they had demurred to the cross-bill.

The utmost complainant in the cross-bill can insist upon is, that the facts stated in his bill have been fully and satisfactorily proven, and the question naturally arises, are they sufficient in law to authorize the decree. This court reversed a decree in *Smith* v. *Brithan*, 98 Ill. 188, principally because the facts alleged in the bill were not sufficient to authorize the relief granted to complainant. The doctrine was distinctly declared in that case, the decree must be according to the allegations of the bill as well as proofs, and unless the bill states sufficient facts to warrant the decree, it can not stand. Much light will be shed on the subject of the present

inquiry by ascertaining, as near as may be, the character of the cross-bill. It can hardly be said it is a bill strictly for the specific performance of any contract the decedent, if now living, would be bound to perform, or that his heirs, since his death, are obligated to perform. It is a significant fact the bill contains no allegation that Benjamin Dyke, by any contract, verbal or written, or for any consideration, either good or valuable, ever agreed to *convey* the land in question to complainant in the cross-bill. It would be a solecism to assume, where there is no contract of any kind founded upon a good or valuable consideration for a conveyance, there could be a decree for specific performance. In this case the bill does not assume to state any contract for the conveyance of the land. The bill proceeds on another theory. It is, that during a period of four years, viz., from January, 1875, to February, 1879, complainant in the cross-bill lived at the house of Benjamin Dyke, and during that time did farm work and had the control of his business, and also employed in such service some of his own teams and his farm machinery, and for such services rendered he never received any pay; that as an inducement to complainant to undertake such services, Benjamin Dyke, on or about the first day of December, 1874, promised and agreed with complainant to buy a farm as soon as he was able, and that complainant should have it. Relying on such promise, complainant alleges he rendered services as stated. It is then alleged, that in pursuance of such agreement, on or about the first day of January, 1879, Benjamin Dyke, with Daniel Irwin, bought the land sought to be partitioned, taking the deed in the names of Benjamin Dyke and Daniel Irwin, and that immediately Benjamin Dyke placed complainant in possession of his share of the land, and thereafter treated the land as in all respects belonging to complainant. That was in March, 1879, and on September 19, 1880, Benjamin Dyke died seized of the land in controversy. The agreement, as set forth, is

simply that Benjamin Dyke, more than six years before his death, promised complainant that if he would come and live with him, and render certain services, when he got able he would buy a farm, and he should have it. What is all this more than a mere promise by the father to make his son a gift when he should feel able to do so? The utmost that can be said of the agreement, as set forth in the cross-bill, is, that the father promised his son, when he got able to do so, to buy a farm, and the son should have it. That is a promise by the father to buy a farm for his son when he felt able to do it, and nothing more. Certainly no one would insist such a contract could be enforced against the father if living, or against his heirs since his death. But it is said it was in pursuance of the agreement with the son that Benjamin Dyke bought the land sought to be partitioned among his heirs. It must not be forgotten it is nowhere alleged in the bill that Benjamin Dyke, either before or after he purchased the land, ever agreed to convey it to complainant in the cross-bill, and although he lived more than a year after he purchased the land, he never did convey it to his son, and it is not alleged that he ever agreed to or ever talked about doing it. This view of the case is strengthened by observing it is alleged in the bill that all the services complainant rendered were prior to the time Benjamin Dyke bought the land, and yet he took the deed in his own name. It is a most unreasonable assumption that if Benjamin Dyke bought this land for his son in consideration of past services, he would take the deed in his own name, and thereafter retain it, without any promise whatever, either written or verbal, to convey it to his son. Even if the evidence could be considered, which it can not, as aiding the allegations of the bill, it will be seen it makes no stronger case than the cross-bill itself. The extent of what is proven is, that Benjamin Dyke often said he intended the land for his son, Lewis. Of course that is simply the expression of the intention to bestow a bounty upon his

son, and it certainly would not be claimed by any one that equity would compel the execution of such an intention, no matter how many equitable considerations there might be in its support. It may be that afterwards he determined not to carry out the intention he had formed to bestow upon his son a bounty, but whether he did or not is a matter of no consequence. It would be absurd to claim that what the decedent may have intended was binding either on him or his heirs.

The pretence Lewis M. Dyke paid a sum of money of over $1200, or any sum, out of his own money, on the indebtedness of his father contracted for the land, has absolutely nothing in its support. Where did he obtain the money he paid? It is alleged in the cross-bill that complainant had worked five years for his father, and never received anything for such services. Evidently he did not receive the money from that source,—that is, for services rendered his father. Did he have or receive money from any other source? It is not proved that he did. It appears he was married in a few days after he became of age, and that he farmed one year on a rented farm before he went back to live with his father. The proof is he made nothing during the year he farmed. There is no pretence or claim that complainant borrowed the money he paid on the indebtedness of his father. It is therefore plain, from the evidence, that the money he used in making the payments was money that was realized from the farm products raised on and sold from his father's farm, and was, in fact, his father's money. Nothing can be plainer than that complainant had no income from any source during the time he worked for his father, and for the services he rendered his father he alleges in his bill he received nothing.

I am of opinion the decree of the circuit court should be reversed.

Syllabus. Brief for the Appellant.

EDWARD C. KEHR

v.

WILLIAM H. SNYDER.

Filed at Mt. Vernon June 13, 1885.

ACCRETIONS—*as to lands bordering upon a river—rule of adjustment as between adjacent riparian owners.* A tract of land bordering upon the Mississippi river was divided into parcels, some of which subdivisions or lots extended to the river bank, as it then was. These lots became the property of various persons. Subsequently there were accretions along the river front, and in adjusting the matter of such accretions among the several adjacent riparian owners, it was *held*, the proper mode was, to measure the entire river front as it was found to be when the lots were laid out, and note the aggregate number of feet frontage, as well as that of each lot; then measure a line drawn as nearly as may be with the middle thread of so much of the stream as lies opposite the shore line so measured; then divide the thread line into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line; and then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines.

APPEAL from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. EDWARD C. KEHR, *pro se:*

The rule for the division of accretions is, either—

First—To apportion them between the respective riparian owners in the proportion in which the new shore line bears to the old. *Deerfield* v. *Ames*, 17 Pick. 41; *Jones* v. *Johnson*, 18 How. 150; 1 Blackf. 209; *Wonson* v. *Wonson*, 14 Allen, 71; *Batchelder* v. *Kenison*, 51 N. H. 496; *Railroad Co.* v. *Hannon*, 37 N. J. L. 276. Or,—

Second—To extend the side lines out from their respective termini on the old shore, at right angles with the course of the river. *Knight* v. *Wilder*, 2 Cush. 199; *Stone* v. *Boston S. and I. Co.* 14 Allen, 230; *Clark* v. *Campan*, 19 Mich. 325;

Gas Light Co. v. *Industrial Works*, 28 id. 122; *Miller* v. *Hepburn*, 8 Bush, 326; *Wood* v. *Appal*, 63 Pa. St. 210; *Thornton* v. *Grant*, 10 R. I. 477; *Aborn* v. *Smith*, 12 id. 355; *Manchester* v. *Point, etc.* 13 id. 355; Gould on Waters, sec. 162.

If either of these rules is found to be the true rule of law, then the circuit court erred in refusing the declarations of law asked by the appellant, and the judgment below is erroneous. The appellant contends that the rule secondly stated is the one applicable to this case, although the one first stated is more advantageous to him in this instance. Either rule will defeat the appellee.

The rule claimed by the appellee, and adopted by the court below, finds no support whatever in the law. Though often urged, it has uniformly been rejected by the courts. "One common principle which pervades all modes of division is, that no regard is paid to the direction of the side lines between contiguous proprietors." Note to *Hagan* v. *Campbell*, 33 Am. Dec. 280.

Messrs. WILDERMAN & HAMILL, for the appellee:

The plaintiff's lot being bounded on the Mississippi river, his title extends to the thread or middle of the stream. See *Washington Ice Co.* v. *Shortall*, 101 Ill. 46; *Warren* v. *Thomaston*, 75 Maine, 329; *Luce* v. *Carley*, 24 Wend. 451.

The thread of the stream is the middle line between the shores, irrespective of the depth of the channel or the direction of the current, taking it in the natural and ordinary stage of the water. *Warren* v. *Thomaston*, 75 Maine, 329; *McCullough* v. *Wall*, 4 Rich. (S. C. L.) 68; *Trustees, etc.* v. *Dickenson*, 9 Cush. 544; Tyler on Boundaries, 75-77; *Deerfield* v. *Ames*, 17 Pick. 41; Angell on Water-courses, (7th ed.) sec. 10, note 2.

There is no fixed rule for the division of alluvium accrued to uplands bounded upon rivers, among the proprietors of the adjoining lots. *Winnisimmet Co.* v. *Wyman*, 14 Allen, 432.

The rising of the sand-bar known as "Arsenal Island," in the river, does not in the least change the middle line of the river, but that line must be surveyed as if the island were under water. *Missouri* v. *Kentucky*, 11 Wall. 395; Tyler on Boundaries, 76, 77; Angell on Water-courses, (7th ed.) sec. 44; Boone on Real Prop. sec. 254; *People* v. *Canal Appraisers*, 13 Wend. 355.

A line drawn at right angles to the thread of the stream,—not the current of the water,—from the river end of the dividing line between lots 233 and 232, on the upland, shows appellant's fence to be on appellee's land.

Mr. JUSTICE MULKEY delivered the opinion of the Court:

This is an action of ejectment, brought by William H. Snyder, the appellee, against Edward C. Kehr, the appellant, to recover a triangular piece of land situate on the eastern bank of the Mississippi river, in East St. Louis, described in the declaration as "that part of lot 233, in the third subdivision of Cahokia commons, which lies west of the right of way of the East St. Louis and Carondelet railway, and extends to the center of the Mississippi river."

The third subdivision of Cahokia commons was laid out and platted by the proper authorities in 1860, under the provisions of the act of 1841, (see Laws of 1841, page 65,) and constitutes a part of United States survey No. 759. The western tier of lots of this subdivision is bounded on the west by the Mississippi river, and when laid off, in 1860, the eastern bank of the river marked their shore line. Of these lots appellant owns No. 232, and appellee No. 233, the latter lying immediately north of the former, and both fronting the river. Since they were laid off, in 1860, a large body of land, or accretions, has formed in front of said third subdivision of Cahokia commons, so that the shore boundary of these lots is not the same as it was in 1860, when laid out and platted.

The strip of land in controversy is a part of these accretions, and whether it belongs to the plaintiff or to the defendant depends entirely upon what rule is to be adopted in making the division of the accretions. If the line dividing the lots of plaintiff and defendant as originally laid off, and terminating on the shore line as it then existed, is to be simply extended through the accretions to the center of the river, without any change of direction or deflection of the line, it is conceded the land in dispute belongs to the plaintiff, but not otherwise. The position is also taken in appellee's brief, that "a line drawn at right angles to the thread of the stream,—not the current of the water,—from the river end of the dividing line between lots 233 and 232, on the upland, shows appellant's fence to be on appellee's land,"—or, in other words, that the land belongs to the plaintiff. While the testimony does not distinguish as clearly between the channel or current and the middle thread of the river as it might, yet when the whole of the evidence is considered we do not think it warrants the claim of appellee. Treating this as a material question in the case, appellee must be held responsible for the consequences if it has been left in doubt.

As to what is the proper rule for the division of accretions in cases of this kind, is a subject that has been so often and ably discussed by the courts of last resort in this country, that we do not deem it necessary, if, indeed, proper, to do anything more than to merely state the proper rule, as we understand it, and refer to some of the cases in which a full discussion of it will be found.

The rule as stated in appellant's third proposition, which the court refused to hold as law, we regard as substantially correct,—that is to say, "measure the entire river front of survey 759 as it existed in 1860, when the third subdivision of Cahokia commons was first laid out," and note the aggregate number of feet frontage, as well as that of each parcel or lot; then measure a line drawn as near as may be with

the middle thread of so much of the stream as lies opposite the shore line so measured. Having done this, divide the thread line thus measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line; then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. This rule seems to be reasonable, and is well supported by authority: *Gray* v. *Deluce*, 5 Cush. 9; *Thornton* v. *Grant*, 10 R. I. 477; *Aborn* v. *Smith*, 12 id. 370; *Miller* v. *Hepburn*, 8 Bush, 326; *Knight* v. *Wilder*, 2 Cush. 199. The rule adopted by the court below is practically without authority to support it. An examination of the cases will show that in the division of accretions the side lines between adjoining riparian owners are, as a general proposition, wholly disregarded. Thus, in *Manchester* v. *Point Street Iron Works*, 13 R. I. 355, it is said: "One common principle which pervades all modes of division is, that no regard is to be paid to the direction of the side lines between contiguous proprietors." (See, also, in this connection, note to *Hagan* v. *Campbell*, 33 Am. Dec. 280.) In Gould on Waters, sec. 162, it is said: "In all cases where practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low water mark as well as high water mark, *without regard to the side lines of the upland*, unless referred to as guides in particular grants, or established as boundaries by agreement or conduct of the co-terminous proprietors, or the acts of public authorities."

There may be special circumstances in some cases requiring a modification of the rule here laid down; but as between the present parties, we see nothing in the record before us to take the case out of the operation of the rule. Indeed, there may be special circumstances, as between some of the parties owning portions of this river front, that would

make it inequitable, as between themselves, to enforce the rule as here stated. But that is no reason, assuming such cases to exist, as is intimated, why the general rule should not be applied as between the present parties.

The judgment of the circuit court will, for the reasons indicated, be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

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114 318
61 a 207

ASAHEL GAGE

v.

JOHN ARNDT.

Filed at Ottawa June 13, 1885.

APPEAL—*transcript of record filed in wrong court.* Where an appeal was allowed to the Appellate Court upon condition of filing a bond within a given time, which was done, and the transcript of the record was filed in this court, and there was no joinder in error or appearance by the other party, so that the cause could be treated as a writ of error, there being no appeal for this court to act on, the case was stricken from the docket.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Mr. AUGUSTUS N. GAGE, for the appellant.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The original bill in this case was filed by John Arndt, against Asahel Gage, in the Superior Court. It is alleged in an amended bill filed by leave of court, that defendant had two tax deeds on the property described in the original bill as belonging to complainant, each of which deeds it is prayed may be set aside, because of irregularities mentioned in the

bill, as a cloud upon the title of the property. Defendant answered the bill, and denied all irregularities charged, and affirmed the validity of his tax deeds. On the trial the court found a certain amount was due to defendant for costs and taxes by him expended on the property, and decreed that on the payment of the sum so found due from complainant to defendant, the tax deeds be set aside and held for naught. Defendant excepted to the decision, and prayed to be allowed an appeal to the "Appellate Court within and for the First District of this State," which was granted to him on condition he would file an appeal bond, with surety to be approved by the court, in the penal sum of $250, together with his certificate of evidence, in thirty-five days from the date of the decree. On the 7th day of January, 1885, which was within the time limited by the order of the court, defendant filed an appeal bond, with sureties, in which it is recited he had prayed an appeal to the Supreme Court, and has since filed the transcript of the record in this court.

As the Superior Court never granted defendant an appeal to the Supreme Court, it is obvious the transcript of the record has been inadvertently filed in this court as upon an appeal. Nor has there been any joinder in error, or any appearance by complainant, so that it can not be said the cause is pending in this court on error. There is no appeal here for this court to act upon. The case will be stricken from the docket. *Chicago, Pekin and Southwestern Railroad Co.* v. *Town of Marseilles*, 104 Ill. 91.

Stricken from docket.

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EDWARD P. STOKER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon June 13, 1885.

LARCENY—*failure of constable to pay over money collected on execution.* A constable who collects money on an execution, and fails to pay the same to the party entitled thereto, is not liable to indictment and conviction for larceny under section 74 of the Criminal Code, but he may be fined under section 79.

WRIT OF ERROR to the Circuit Court of Jackson county; the Hon. O. A. HARKER, Judge, presiding.

Messrs. ALLEN & HARBEN, for the plaintiff in error:

The indictment was under section 74 of the Criminal Code, which presupposes that the goods must have been "delivered" to the party charged, as contradistinguished from a "levy" or a "taking" under legal process,—that is, they must have been given over in trust.

The case here falls within the provisions of section 79 of the Criminal Code. It defines the offence and fixes the punishment, thereby excluding all other punishments for this offence. *Gaddis* v. *Richland County*, 92 Ill. 119; *Eldridge* v. *Pierce*, 90 id. 474.

The money in the hands of the officer is not the property of the plaintiff in execution until paid over to him. *Zschocke* v. *People*, 62 Ill. 127; *Lightner* v. *Steinagel*, 33 id. 513.

Mr. GEORGE HUNT, Attorney General, for the People:

It is contended that the indictment should have been found under section 79 of the Criminal Code, and not under section 74. It is true section 79 provides for the punishment of certain offences by constables and other officers, but not for embezzlement. The offence provided for in section 79 is a

failure or refusal "to pay over money collected by him, less his proper charges, on demand by the person entitled to receive the same." This offence is only a misdemeanor. The proof may clearly establish it, and yet by no means show the crime of embezzlement.

An indictment for embezzlement will not lie for the offence named in section 79, against a constable, and yet a constable, as such, may be guilty of embezzlement. Therefore the provisions of this section do not preclude the right to punish such officer in any other manner than as therein provided, and the indictment could not properly have been found under section 79.

The indictment sets forth the fiduciary character of the accused, to-wit, that he was a constable; that as such he did embezzle and convert to his own use the money, goods and chattels of another, and so committed larceny, bringing the case within the rule laid down in *Kibs* v. *People*, 81 Ill. 599.

The statute (section 74) not only presupposes the goods must have been delivered to the party charged, but says, in terms, "fraudulently converts to his own use the money, etc., delivered to him." The statute does not say, "delivered to him by the owner thereof," or "by the person entitled to the possession thereof." The offence is the fraudulent conversion to his own use of money delivered to him in a fiduciary capacity.

The payment to the officer discharged the debt to Aultman, Miller & Co., and they were then entitled to the money, —the identical money received by him for them. Any other rule would render it impossible for an officer to be convicted of larceny for an embezzlement of the money.

But the conviction may be sustained under section 80 of the Criminal Code. There can be no dispute here that a constable comes within the list of officers enumerated in that section, and that the money in question was "in possession of such officer by virtue of his office."

Where the indorsement was indictment for robbery, but in the allegations it was a good indictment for larceny, the defendants were properly required to plead. *Collins* v. *People*, 39 Ill. 233.

Messrs. MCELVAIN & MARTIN, also for the People:

It will be observed that the language used in section 74 of the Criminal Code is comprehensive in its scope, and includes all who may embezzle.

The offences punishable under section 79 are not those prompted by a felonious intent, and under it a party could be justly prosecuted for a refusal to pay over moneys collected by him, whether he converted them to his own use, or embezzled them, or not.

It is not necessary that Aultman, Miller & Co. should have an absolute title or right to the specific money collected by Stoker, in order to sustain the verdict in this case. A general or qualified property in the goods stolen or embezzled, and the right to possession, are sufficient. Moore on Crim. Law, sec. 501, and authorities cited; Wharton on Crim. Law, sec. 932; *Barnes* v. *People*, 18 Ill. 52.

The general property in the money collected by Stoker was in Aultman, Miller & Co., the judgment creditor. When goods are levied upon, for the purpose of sale, by a constable, he has a special property in them, the judgment debtor retaining a general property in them until their lawful sale on execution, when the judgment creditor acquires a general property in the proceeds of the sale, whether he receives such proceeds or not. *Zschocke* v. *People*, 62 Ill. 127; 2 Archbold's Crim. Pr. and Pl. 358.

It matters not whether Aultman, Miller & Co. ever had this money in possession or not. Property may be embezzled before it reaches its owner. Wharton on Crim. Law, secs. 1010, 1049.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment against Edward P. Stoker, in the circuit court of Jackson county, for larceny, under section 74, chapter 38, of the Revised Statutes of 1874, which declares: "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently to convert to his own use, money, goods or property delivered to him which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny." On a trial before a jury the defendant was found guilty, and his term of imprisonment was fixed at one year in the penitentiary.

The facts relied upon to sustain the conviction may be stated in a few words. In 1882 the defendant, Stoker, was a constable in Jackson county. Aultman, Miller & Co. obtained judgments against William Spence, Jr., upon which executions were issued, and placed in the hands of the defendant, as constable, for collection. In the month of September of that year the defendant collected on the executions $211.50, for which he gave his receipt as constable. The money collected the defendant failed to pay over.

Several questions have been discussed in the argument, but the principal point in the case is, whether, under the facts, the defendant was liable to be indicted and convicted under section 74 of the Criminal Code, heretofore set out. It will be observed that a constable is not mentioned in this section of the statute. It will also be found, upon an examination of section 79 of the same chapter of the statute, that said section in express terms includes constables. It is as follows: "If any attorney at law, justice of the peace, constable, * * * or other person authorized by law to collect money, shall fail or refuse to pay over any money collected by him, less his proper charges, on demand by the person entitled to receive the same, or his agent duly authorized, he shall be fined," etc. There can be no doubt in regard to the

fact that the defendant was liable to be prosecuted and convicted under this section of the statute. He was a constable, and in his official capacity as such he collected money, and failed to pay it over. His case falls directly within the terms of this section of the statute. It is true that the word "whoever," used in section 74, has a broad and comprehensive meaning; but at the same time, it is unreasonable to believe that the legislature intended that a constable should be prosecuted under both sections of the statute. Under section 74 the offence consists of fraudulently converting to his own use, etc., money or property *delivered* to the person charged with the offence. Here, the money was not delivered to the defendant, within the meaning of the statute. It was collected by him, in his official capacity as constable, upon certain executions which came into his hands as an officer. It can not be said that Aultman, Miller & Co. delivered the defendant money, nor is it accurate to say that William Spence, the person against whom defendant held the executions, delivered him money. If the defendant under the executions had levied upon property, and sold and converted it into money, as a constable is required to do under the statute, it would not, under such a state of facts, be correct to say money had been delivered to him, but, on the other hand, the proceeds of the sale would be money collected by him. Nor can the fact that the money was collected without a levy upon property, make any difference. It was still money collected by him. If we are correct in this, the defendant did not fall within the terms of section 74, and was not liable under that provision of the statute.

The judgment of the circuit court will be reversed and the cause remanded.

Judgment reversed.

Syllabus.

THE UNION RAILWAY AND TRANSIT COMPANY

v.

THOMAS KALLAHER, Jr., Admr.

114 325
207 *463

Filed at Mt. Vernon June 13, 1885.

1. NEGLIGENCE—*two corporations acting together—when the servants of one to be regarded as also the servants of the other.* In an action to recover for the death of the plaintiff's intestate, occasioned, as was alleged, by the wrongful act of the servants of the defendant company, a railway and transit company engaged in transferring, with its own motive power, trains of cars over the St. Louis bridge across the Mississippi river, it appeared this service was performed under a private arrangement between the defendant company and another corporation—the bridge company—for a compensation paid by the latter company, the two companies thus acting together in the transportation of passengers over the bridge, and in that regard there was concert of action between them. The collector of fares for the bridge company was on the trains crossing the bridge, by the consent, and certainly with the knowledge, of the defendant company, and it permitted that servant of the bridge company to control the movements of its trains. On the occasion in question, the plaintiff's intestate was a passenger on one of defendant's trains, and while the train was passing over one of the approaches to the bridge it was stopped in obedience to a signal given by the collector of fares for the bridge company, and by his direction the passenger was put off the train upon a trestle, from which he fell and was killed. It was *held*, as affecting the question of the liability of the defendant, that the collector of fares for the bridge company, while he was the servant of that company, was to be considered, for the time being, at least, and while so engaged on the train, as the servant of the defendant also.

2. INSTRUCTION—*amendment by erasure, leaving words still legible.* It was objected that in erasing a sentence from an instruction, the words were still legible. The matter intended to be stricken out was of no importance whatever, and it mattered little whether the jury could still read it or not. The words so crossed out were still legible, but not plainly so, and it was not likely any jury would consider them after they had been erased in that manner. There was nothing in the objection.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. G. & G. A. KOERNER, for the appellant.

Mr. CHARLES W. THOMAS, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This suit was brought in the circuit court of St. Clair county, by Thomas Kallaher, Jr., administrator of the estate of Thomas Kallaher, Sr., deceased, against the Union Railway and Transit Company, to recover damages resulting to the next of kin on account of the death of the intestate, which it is averred was caused by the wrongful conduct of defendant.

It is averred in the declaration that on the 22d day of September, 1878, defendant was operating a railroad on the Illinois and St. Louis bridge and its approaches, between the Union depot in St. Louis and the relay depot in East St. Louis, and that defendant was a common carrier, and carried passengers for hire; that the intestate, Thomas Kallaher, Sr., became a passenger on one of defendant's trains, and that while he was such passenger, defendant's servants unlawfully and forcibly ejected him from such train, and compelled him to leave it, in the night time, upon the approach to the bridge, at a place where the train was upon an open piece of trestlework elevated a great distance above the ground, and where it was dangerous and unsafe for a man to be afoot, and where there was no regular or usual stopping place or station for taking on or putting off passengers, and that the intestate, without any fault on his part, while endeavoring to escape from such dangerous place, was precipitated to the ground and instantly killed. The declaration contains the usual averments as to the next of kin, and the appointment of plaintiff as administrator of the estate of the intestate, and that whatever damages might be recovered could be distributed under the provisions of the statute. Two amended counts were added to the declaration by leave of

court, in which it was more definitely stated defendant's servants assaulted the deceased, and carelessly and negligently ejected him from the cars in the night time, and at a place on its railroad where there is open and unguarded trestlework elevated a great distance above the ground. To the declaration averring the facts relied on to show a cause of action, defendant pleaded not guilty. It seems the case was three times submitted to a jury for trial. On the last trial the jury found the issues for plaintiff, and assessed his damages at the sum of $5000. The motion made for a new trial was overruled, and the court entered judgment on the verdict. That judgment was affirmed in the Appellate Court for the Fourth District, and defendant brings the case to this court on its further appeal.

This court is not asked to pass upon the facts of the case any further than to find whether they give countenance to the instructions complained of. With that view the testimony has been subjected to a careful examination. Whether the evidence sustains the averments of the declaration, is, of course, a question not open to investigation in this court. The duty and responsibility of ascertaining that fact are devolved by law upon the trial and Appellate courts, and the judgment of the latter court on all controverted questions of fact is made conclusive on this court.

Only two instructions were given for plaintiff, to both of which defendant has saved exceptions in the usual way. It is not insisted the first instruction does not state a correct principle of law, but the objection taken is, there is not a particle of evidence deceased exercised ordinary care for his personal safety. It is true, as counsel contend, the record contains little, if any, direct testimony concerning the care the intestate observed; but it must be remembered the accident occurred in the night time, and at a point where it was seen by only a few persons. All the facts and circumstances connected with the casualty were proven by the best evidence

obtainable, and it is thought there was enough in the case to warrant the court in giving the instruction, as was done.

As respects the second instruction given for plaintiff, it is said there was no proof the servants of the two companies acted together in the transportation of passengers, nor was there any evidence the bridge company exercised any authority, or performed duties thereon, with the knowledge and permission of defendant. It is thought the testimony in the record proves more on this branch of the case than the objection taken seems to concede. There is evidence the bridge company employed defendant, and paid it a compensation for taking trains over the bridge. This, of course, was a private arrangement between the two corporations. In that way the two corporations,—defendant corporation and the bridge company,—acted together in the transportation of passengers over the bridge, and there was concert of action between them. But more than this, in fact, appears from the testimony. The special business of defendant, as is proven, was to take with its own motive power all trains arriving at and departing from St. Louis, over the bridge,—that is, from the relay depot in East St. Louis to the Union depot in St. Louis, and from the Union depot to the relay depot. It is further proven the collector of fares for the bridge company was on the train by the consent, and certainly with the knowledge, of defendant, and it permitted that servant of the bridge company to control the movements of the train. It appears the defendant stopped the train in obedience to the signal given by the servant of the bridge company, and for the time being, at least, and while so engaged on the train, he must be regarded as the servant of defendant, also. In this view the instruction states the law with sufficient accuracy.

The modification made to the first of defendant's instructions by adding an explanatory sentence, was proper enough to be made; but complaint is made of the action of the court in striking out the last sentence of the instruction in such a

manner as to be still legible. The matter stricken out in that manner was of no importance whatever, and it matters little whether the jury could still read it or not. The words so crossed out were still legible, but not plainly so, and it would seem that no jury would consider them after they had been erased in that manner. The objection has really nothing in its support.

Nor was there any error in the action of the court in cutting off the last sentence of the third instruction asked by defendant. It did not state a correct principle of law. The credibility of the several witnesses is a question for the jury, concerning which it is not the province of the court to express an opinion.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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114 329
61a 512

DANIEL POWELL

v.

JANE POWELL *et al.*

Filed at Ottawa June 13, 1885.

1. WITNESS—*competency—widow, on behalf of herself and the heirs—on bill to establish a trust in favor of the estate.* On bill filed by the widow and heirs of a deceased person to establish a trust alleged to have existed in favor of the deceased in his lifetime, and enforce the same for the benefit of herself and the heirs, the widow is a competent witness in her own behalf, and in behalf of the heirs, as to all matters affecting the transaction of which she had personal knowledge.

2. SAME—*competency of defendant in suit by widow and heirs to establish and enforce a trust—husband and wife.* On bill by the widow and heirs of a deceased person to establish and enforce a trust in real estate, the defendant is not a competent witness to testify in his own behalf to anything but matters falling within the exceptions to section 2, chapter 51, of the Revised Statutes of 1874. Under these exceptions, where witnesses in behalf of the complainants have testified to conversations, admissions or transactions

of such defendant, he is competent to testify as to the same conversations, admissions or transactions.

3. SAME—*wife for the husband.* But such a case is not one wherein the wife of the defendant is rendered a competent witness, by the statute, to testify in his behalf. There was no element of agency on her part in connection with the transaction.

4. TRUST—*taking title to hold as an indemnity—whether a trust.* A contract was made for the purchase of a lot of ground for $900, $100 of which was to be paid down, and eight notes given for the balance, bearing six per cent interest. The purchaser being unable to make the first payment, induced his father to advance the same, and give his individual notes for the balance, and the contract for the deed was made directly to the father as a security for the money so advanced, and to indemnify him against liability on his notes for the remaining purchase money. The son afterward repaid his father the sum so advanced, went into possession of the lot, paid the taxes, and made valuable improvements thereon, and paid the interest on the notes. It was *held*, that the father held the bond for the deed in trust for the son.

5. TENDER—*in chancery—on bill to declare and enforce a trust.* Where the object of a bill is not to redeem from a trust, but to declare and enforce the same, the defendant holding the title to land in trust to indemnify himself from liability in respect to the purchase money, there is no necessity to allege or prove a tender. It is sufficient to allege a readiness and willingness on the part of the complainant to pay the obligations on which the defendant is liable.

6. COSTS—*in chancery—bill to enforce trust.* A party who holds the evidence of title to a lot in trust for the real owner, as a security against the payment of notes given by him for the purchase money, and denies the trust and claims to have bought the property for himself, so as to make it necessary to file a bill against him by the heirs of the original *cestui que trust*, can not complain that he is adjudged to pay part of the costs, as he might properly have been required to pay all the costs.

APPEAL from the Circuit Court of Peoria county; the Hon. JOHN BURNS, Judge, presiding.

Mr. GEORGE A. WILSON, and Messrs. PUTERBAUGH & PUTERBAUGH, for the appellant:

Parol evidence to establish a trust is not regarded with favor, and the court will not act upon it if it be not strong and irrefragable, or if it be contradicted by other testimony. *Lantry* v. *Lantry*, 51 Ill. 466; *Owen* v. *Blake*, 44 id. 155;

Clarke v. *Quackenbos*, 27 id. 260; *Sharp* v. *Smitherman*, 85 id. 154; Hill on Trustees, 167, and cases cited in notes.

Jane Powell, the widow of Martin Powell, was not a competent witness. *Smith* v. *Long*, 106 Ill. 485; *Insurance Co.* v. *Foster*, 90 id. 121; *Mueller* v. *Rebhan*, 94 id. 142; *Pyle* v. *Oustatt*, 92 id. 216.

The defendant was competent to testify to the same conversations, etc., given by other witnesses against him. *Penn* v. *Oglesby*, 89 Ill. 113.

Upon the case made out by the bill, which is, in effect, one to redeem, the complainants, in order to recover costs, must have tendered the amount due before commencing suit. *Barnard* v. *Cushman*, 35 Ill. 452.

The court also finds in the decree that the original $100, to secure which the bond was made out in the name of the defendant, has not been paid. If this is so, there is no reason for requiring the defendant to pay costs until he has placed himself in the wrong, by refusing the amount due, upon a proper tender made.

Mr. DANIEL F. RAUM, Mr. GEORGE B. FOSTER, and Messrs. JACK & MOORE, for the appellees:

Jane Powell was a competent witness, as section 5, chapter 51, of the Revised Statutes, has no application. Sections 1 and 5 of that act did away with the common law rule as to the competency of husband and wife to testify as to transactions and conversations occurring during marriage. *Mueller* v. *Rebhan*, 94 Ill. 142.

The exclusion of husband or wife as a witness can only be in a case where one or the other is a party, for only under such circumstances could they testify for or against each other. The fact that the transaction or conversation occurred during marriage does not alone constitute the prohibition. The wife must be called as a witness for or against her husband. *Denston* v. *Hoagland*, 67 Ill. 265; *Galbraith* v. *McLean*, 84 id. 379.

Daniel Powell is not, however, a competent witness, except as to certain admissions or conversations to which some of the witnesses testify as made to them out of the presence of Martin Powell, (Rev. Stat. chap. 51, sec. 2,) and he being incompetent, his wife, Margaret Powell, is also incompetent.

The transaction shows a trust or security to Daniel Powell for the money by him advanced, and as indemnity against his liability. This being shown, all the consequences attached to a trust or mortgage follow. Once a mortgage always a mortgage. *Russell* v. *Southard*, 12 How. 139; *Cameron* v. *Irwin*, 5 Hill, 280; *Remsen* v. *Hay*, 2 Edw. Ch. 535; *Waters* v. *Randall*, 6 Metc. 484; *Willetts* v. *Burgess*, 34 Ill. 494; *Patterson* v. *Yeaton*, 47 Maine, 308.

The awarding of costs in chancery is a matter of discretion for the most part. *Smith* v. *Cremer*, 71 Ill. 185; *Knowles* v. *Knowles*, 86 id. 1.

The fact that defendant denied the right to the relief sought, and claimed the land to be his absolutely, dispensed with the tender to him of the amount which was his due. *Hanna* v. *Ratekin*, 43 Ill. 462; *Simms* v. *Clark*, 11 id. 137; *Thayer* v. *Meeker*, 86 id. 470.

A court of equity is not bound by any fixed rules in relation to the tender of money. When it would appear, from all the facts proven, that a tender would have been unavailing, and would not have prevented costs, a tender is not necessary. *Webster* v. *French*, 11 Ill. 254; *Barnard* v. *Cushman*, 35 id. 451; *Owen* v. *Blake*, 44 id. 135.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

The object of this bill is to declare and enforce a trust, and to that end to enjoin, etc. The substance of the principal allegation is this: Martin Powell, who has since deceased, in June, 1880, entered into a contract with Anna M. Dobbins for the purchase of a lot in the city of Peoria. The price to

be paid was $900, of which $100 was to be paid down, and promissory notes of $100 each, bearing interest at the rate of six per cent per annum from date, were to be given for the payment of the remaining $800, and she was to give a title bond, obligating herself to make conveyance upon payment of these promissory notes. Martin was unable to raise the $100 with which to make the first payment, and his financial condition was very low. He entered into a contract with his father, Daniel Powell, whereby the latter agreed to advance the $100 payment, execute his individual notes for the deferred payments, and take the title bond to himself, and hold it for the benefit of Martin, and until Martin should repay him. Daniel advanced the $100, which Martin applied as a first payment on the property, gave his individual notes for the deferred payments, and took title bond to himself, as provided by the contract. Soon afterwards Martin repaid Daniel the $100, and entered into the exclusive possession of the property, and since that time he has paid the interest on the notes and all taxes and assessments upon the property. He has erected valuable improvements upon the property, a part of which he has occupied as a saloon. Martin died intestate, leaving the principal upon the notes unpaid. The bill avers a readiness and willingness to pay the notes and accruing interest, and charges that Daniel Powell threatens to pay off the notes and take a deed to himself, in violation of his trust. The answer denies the trust, and charges that the purchase was by Daniel alone, Martin acting therein merely as his agent. On hearing, the circuit court found the facts in accordance with the allegations of the bill, and decreed allowing Daniel to make payment of the promissory notes and take title to himself, to be held in trust for the complainant until reimbursed the money advanced by him.

Some question arose during the trial as to the competency of witnesses. It is quite clear that Jane Powell, widow of

Martin Powell, was a competent witness. She was not called to testify in behalf of Martin Powell, but in behalf of herself, as his widow, and the other complainants, who are his children and heirs at law. Even at common law, but for her interest as dowress she would have been a competent witness in behalf of the children and heirs at law as to all matters coming to her knowledge through sources other than communications of her husband. (1 Greenleaf on Evidence, sec. 338; *Lockwood* v. *Mills et al.* 39 Ill. 602.) The first section of chapter 51, of the Revised Statutes of 1874, page 488, removes the disability on account of her interest, and so she was a competent witness as to all matters affecting the transaction of which she had personal knowledge. *Deniston et al.* v. *Hoagland*, 67 Ill. 265; *Galbraith* v. *McLain et al.* 84 id. 379; *Mueller* v. *Rebhan*, 94 id. 142. The cases cited by counsel for appellant, *Pyle* v. *Oustatt*, 92 Ill. 216, *Westchester Fire Ins. Co.* v. *Foster*, 90 id. 121, and *Smith* v. *Long*, 106 id. 485, are totally unlike the present case, and decide nothing inconsistent with this view of the law.

Daniel Powell is directly interested in the event of the suit, being the sole defendant, and the adverse parties sue as heirs at law of the deceased, Martin Powell, and he is hence incompetent to testify to anything but matters falling within the exceptions to section 2, chapter 51, of the Revised Statutes of 1874, *supra*. Under those, where witnesses on behalf of the complainant have testified to conversations, admissions or transactions of his, he is competent to testify in regard to the same conversations, admissions or transactions. The case is not one wherein his wife, Bridget, is rendered a competent witness by the statute to testify in his behalf, and her evidence, therefore, can not be considered. The proofs clearly show that she did not act as the agent of her husband in this transaction.

Considering the evidence that we deem competent, alone, it is impossible to say that we are satisfied the circuit court

erred in rendering the decree. Anna M. Dobbins resided in Chicago when the trade was made, and she contracted through her agent, H. C. Bestor, of Peoria. There is not the slightest reason apparent for discrediting his testimony in any respect. He has no interest in the suit, and no apparent motive for caring as to the result. He is intelligent, and has a clear recollection of the transaction. He shows that the purchase was by Martin Powell for himself, and that Daniel Powell was only a trustee. He is sustained by other witnesses, and by circumstances,—such as, the making of contracts by Martin in his own name, for the improvement of the property, and the working of Daniel Powell, in making the improvements, as a common laborer, for Martin, and his receiving wages as such. Jane Powell's evidence is also direct, positive and full to the fact that the property was purchased by Martin for himself, and that Daniel took the title bond in trust; but we place less reliance on her evidence on account of her interest in the result of the suit.

There is much evidence directly contradictory of that on behalf of the complainant, some of which can be reconciled with it, and a considerable amount that can not be. Some witnesses who testify to declarations of Martin to the effect he admitted that the property belonged to Daniel, testify, doubtless, very candidly and very truthfully; and yet their evidence, when construed in the light of the surrounding circumstances, makes very little in favor of the defendant.

The motive for having the contract in the name of Daniel, and the bond executed to him, was to afford Daniel a certain and ample security for all advances to be made and all liabilities to be incurred by him. As between them, the ownership was to be in Daniel until he was reimbursed by Martin. Legally the title was in Daniel; equitably it was in Martin,—and this they evidently well understood. It is quite apparent from the evidence, that when Martin was trying to obtain credit, and wished to magnify his ability to pay, he ignored his

father's legal rights, and assumed that his equity embraced every title and claim to the property; and when he was threatened with suits of creditors whom he wished to put off, he assumed that his father's legal rights embraced everything of value in the title to the property. In neither contingency was his language wholly and unqualifiedly true. The contract, literally, was with Daniel, and Martin was not at all times as particular as entire truth required to disclose the trust in his favor.

We are not inclined to give much weight to some of the testimony of the brothers of Martin. They testify, quite evidently, under deep feelings of prejudice. It will subserve no useful end to recapitulate and comment upon the evidence of each witness. We are content that after having carefully and dispassionately considered all the evidence, we are unable to say that the decree below is clearly wrong.

The bill is not one to redeem, but one to declare and enforce a trust, and there was, therefore, no necessity to allege or prove a tender. The defendant having denied his trust, imposed upon complainants the necessity of filing the bill, and he might, therefore, very properly have been taxed with all the costs. His complaint that he was taxed with part of the costs, is not reasonable.

No sufficient cause is perceived for disturbing the decree below. It is therefore affirmed.

Decree affirmed.

Syllabus. Statement of the case.

114 337
76a 474
114 337
104a 1155

THE PEORIA AND PEKIN UNION RAILWAY COMPANY

v.

WARREN R. BUCKLEY *et al.*

Filed at Ottawa June 13, 1885.

1. WAREHOUSEMAN—*delivery to wrong person—liability to the owner.* Where a warehouseman receives grain, he will be liable to the party storing the same if he delivers it to any other person without authority from the owner, unless the latter has done some act or acts to estop him from denying permission to make such delivery.

2. SAME—*delivery of grain on a sampler's ticket—whether a protection to the warehouseman.* It is the usual custom on the board of trade in Peoria, when grain has been consigned to a dealer, and the railroad cars in which it was shipped remain upon the track, to cause the grain to be sampled by a person appointed by the board of trade for that purpose, the sampler giving to the consignee a ticket stating the kind and grade of the grain inspected, and the consignee named, with a sample of the grain. It appeared also to have been the custom, when a sale was made on the board, for the seller to mark on the sampler's ticket, the name of the purchaser, and the price, and give the same to the purchaser, with an order, either verbal or written, to deliver the grain sold at such place as the buyer may designate. It was *held*, that a warehouseman, to whom a shipment of grain had been delivered on the order of one who had purchased under the conditions mentioned, was not authorized to deliver the grain to such purchaser merely upon the presentation of the sampler's ticket with the name of the purchaser and the price marked thereon, without any order from the seller. The sampler's ticket was not a warehouse receipt, in the sense that term is used in the statute.

3. SALE FOR CASH—*whether complete before actual payment—payment by check.* Where a contract is made for the sale of grain at a warehouse, for cash, the purchaser will not be entitled to possession before payment of the price; and a check given by him on a bank for the price, which is dishonored, is no payment, and he acquires no title to the grain by giving such worthless check.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. N. M. LAWS, Judge, presiding.

This suit was brought in the circuit court of Peoria county, by Warren R. Buckley and Thomas J. Pursley, composing the

firm of Buckley, Pursley & Co., against the Peoria and Pekin Union Railway Company. The declaration is in the usual form in trover, to which the plea of not guilty was filed. On the trial before the court without the intervention of a jury, the court found the issues for plaintiffs, and assessed their damages at the sum of $473.46. The motion made for a new trial was overruled, and the court rendered judgment on its finding, against the defendant, for the sum found to be due plaintiffs. That judgment was affirmed in the Appellate Court for the Second District, and a majority of the judges of that court having made the necessary certificate to enable it to do so, defendant brings the case to this court on its further appeal.

Messrs. Stevens, Lee & Horton, for the appellant:

The very appropriation of the grain is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee. Benjamin on Sales, sec. 315.

The reason the cash was not demanded was that the quantity had to be ascertained by weighing. Where anything remains to be done to complete the contract, such as ascertaining the quantity, or the delivery of possession, the title does not pass till the contract is thus completed, while the title may pass where the contract is completed, although something may remain to be done under the contract in order to ascertain the amount to be paid by the purchaser. In such case, if the possession is delivered under the contract, and such is the intention of the parties, the title may pass, although the quantity is subsequently to be ascertained. *O'Keefe* v. *Kellogg*, 15 Ill. 347; *Kohl* v. *Lindley*, 39 id. 199; *Foster* v. *Ropes*, 111 Mass. 10.

If goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to

ascertain what would be the price of the whole at a rate agreed upon between the parties, title will pass. *Crofoot* v. *Bennett*, 2 Comst. 258; *Groat* v. *Gile*, 51 N. Y. 431; *Bradley* v. *Wheeler*, 44 id. 495.

The elevator company, acting in good faith, had delivered the grain to the purchaser, who had the *indicia* of ownership, and though appellees might have retaken the grain from Patterson, they could not prejudice the rights of appellant. *Railway Co.* v. *Kerr*, 49 Ill. 458; *Young* v. *Bradley*, 68 id. 553; *Railway Co.* v. *Phillips*, 60 id. 190; *Van Duzor* v. *Allen*, 90 id. 499.

Messrs. Puterbaugh & Puterbaugh, for the appellees:

The sale being for cash, the contract was not completed until the money was paid; and an attempted payment by a check, which is dishonored, is no payment, and if it is given for grain sold for cash, and delivered on such check, the grain may at once be reclaimed by the seller. *Canadian Bank* v. *McCrea*, 106 Ill. 281; *King* v. *Strong*, 35 id. 9; *Matthews* v. *Cowan*, id. 341.

The delivery of the sampler's tickets to Patterson did not complete the sale, or the delivery of the property; nor did they vest the title in him until there was an actual delivery.

Mr. Justice Scott delivered the opinion of the Court:

On the trial of this case defendant submitted numerous propositions to be held as law applicable to the case, most of which were refused, and on that decision of the court the questions of law discussed arise. In order to determine whether the rulings of the court on the propositions submitted were erroneous or not, it will be necessary to ascertain the principal facts, and in doing so it will be understood that all the facts the evidence tends to establish, were found, by the trial and Appellate courts, in favor of plaintiffs.

It appears that defendant is a warehouseman, and has an elevator on its line of railroad, situated in the city of Peoria, and known as "Elevator A." On the 26th day of October, 1883, plaintiffs, who were grain dealers at Peoria, received car No. 12,977, consigned to them, containing oats, and on the next day they received car No. 2397, also containing oats. It is proven it was the usual custom, and one most generally observed by dealers on the board of trade in Peoria, when grain is consigned to a dealer, and the cars stand on the track, to cause it to be sampled by a person appointed by the board of trade for that purpose. The sampler gives a ticket stating the kind and grade of the grain inspected, and the consignees named, and posts one of these tickets in the car, and gives the other to the consignee with a sample of the grain. That was done in this case. There is evidence tending to show it was the custom among dealers on the board of trade, (as plaintiffs were,) when a sale is made on the board, for the seller to mark on these tickets the name of the person to whom the grain may be sold, and the price at which it is sold, and give the same to the purchaser, with an order, either verbal or written, to deliver the grain sold at such place as the buyer may designate. In this case the grain in controversy was sold by plaintiffs on the board of trade to a fellow member of that board, by the name of Patterson. The inspection tickets were delivered to Patterson at the time plaintiffs sold him the oats. On the tickets plaintiffs wrote the price in figures at which the oats were sold, and marked thereon the letter "A," which indicated the elevator at which Patterson wished to have the oats delivered or sent. The oats were sent to defendant's elevator by directions of plaintiffs, and were there unloaded. As respects these facts there seems to be no disagreement between the parties. The oats were sold to Patterson, and his check taken for the amount to be paid. On presentation to the bank, on the next

morning after it was drawn, the check was not paid, as the drawer had no money in the bank. In the meantime the oats had been shipped away, by the order and on account of Patterson, by defendant, under the directions of Patterson, and the question presented is, whether defendant had any rightful authority to ship the oats on the order of Patterson. Plaintiffs admit they directed the railroad company to deliver the oats at the elevator of defendant, but they deny most positively they ever gave defendant any authority, either verbal or written, to deliver the oats, or any part of them, to Patterson. The only proof made by defendant, as respects any order from plaintiffs to deliver the oats to Patterson, was the presentation of the inspection tickets by Patterson, with the price marked thereon, and the letter "A," which indicated the oats were to be delivered at defendant's elevator for the consignee; but the tickets, although in the hands of Patterson, contain no order to defendant to deliver the oats to him. The tickets were delivered to Patterson, as was the usual custom on the board of trade, as evidence of the price at which the grain was sold to him, and nothing more. It was to be a cash sale, and plaintiffs were under no obligation to direct defendant to deliver the oats to Patterson until the same were paid for. The giving of a check is no actual payment unless it is afterwards paid. In this case the check given by Patterson, as has been seen, was not paid, and on learning that fact, plaintiffs immediately demanded the oats of defendant, and which they did not and could not deliver, for the reason they had before that time shipped the oats on the order of Patterson. It was a controverted question of fact, at the trial, whether defendant had any authority, verbal or written, from plaintiffs, to deliver the oats to Patterson, and as it must have been found against defendant in the lower court, which had the exclusive authority by law to determine such questions, it is not open for investigation in this court. On the hypothesis defendant had no prior authority from plaintiffs to deliver

the grain to Patterson, the law is, it is responsible for it to plaintiffs.

The court, at the instance of defendant, held the law to be, "that if Buckley & Co. clothed Patterson with evidence of the ownership of the grain in controversy, or held him out as the owner of it, or allowed him to appear as the owner of the grain, with full power of disposition, and the elevator company was innocently led into dealing with him on the strength of his apparent ownership or authority, it will be protected in so doing, and Buckley & Co. can not now recover of said elevator company the value of said grain." Evidently the court found the facts did not bring the case within the operation of the principle embodied in this proposition, which states the law quite as favorably for defendant as it could ask to have it expressed. The propositions refused contain little more than the one held to be law, although expressed in somewhat different language. In view of the fact the court must have found defendant had no sufficient authority to deliver the grain it had received as the property of plaintiffs, to Patterson, there was certainly no error in law in refusing to hold as the court was asked to do in the several other propositions submitted. Unless defendant had permission from plaintiffs, expressed in some form, either verbal or written, or implied by their acts, or were estopped by some act or acts done to deny such permission was given, the shipping of the grain by the direction of Patterson, and on his account, was clearly wrongful, and the law would require the warehouseman to account for it to the consignee for whom it received it in the first instance. The slips delivered to plaintiffs were not warehouse receipts, in the sense those terms are used in the statute. No warehouse receipts were issued when the grain was received. As the grain was received for plaintiffs, common prudence would have required defendant to obtain specific directions to that effect from the storers before shipping the grain on the order of Patterson. This it failed or neglected to do, and the loss

must fall upon the warehouseman. Unless such precautions are observed, it is obvious there would be no safety for the storers of such commodities.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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114 343
168 497

CATHARINE REBHAN

v.

SOLOMON MUELLER.

Filed at Mt. Vernon June 13, 1885.

1. PROBATE OF WILL—*within what time allowed.* There is no statute or law in this State limiting the time of probating a will to any given number of years. In this case, a will was admitted to probate thirteen years after the death of the testator, and letters of administration which had been previously issued on his estate were revoked.

2. REVOCATION *of letters of administration on finding a will—as to acts prior to the revocation.* Where a will of a deceased person is found and probated after the grant of letters of administration on his estate, such letters will be revoked; but all rights acquired under the letters will be protected.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. W. C. KUEFFNER, and Mr. J. M. DILL, for the appellant:

The lapse of seven years after the death of a decedent constitutes a bar to granting letters of administration, but which bar may be removed by showing circumstances which prevented an earlier application for them. *Fitzgerald* v. *Clancy*, 49 Ill. 465.

With regard to the time within which the lien of a creditor against the lands of a deceased, for the payment of the latter's debts, must be enforced, this court has repeatedly decided

that although there is not an express statute of limitations within which such a lien may be enforced, it would seem, by analogy to the lien of judgments and the limitations for entry upon and recovery of lands, that seven years from the death of an intestate should bar such liens. *McCoy* v. *Morran*, 18 Ill. 519; *Reed* v. *Colby*, 89 id. 107, and authorities there cited.

In *Rosenthal* v. *Renick*, 44 Ill. 205, the rule is said to be established in order to protect innocent purchasers. The reasons for protecting an innocent purchaser against a will kept secret, are as cogent as those for protecting him against the secret lien of debts.

By a modern regulation of the Prerogative Court of Canterbury, where probate of a will is applied for more than five years after the decease, some explanation should be given for the delay. *In the goods of Darling*, 3 Hagg. 561; 1 Williams on Executors, 195.

A proceeding to probate a will is a suit or action, and the Statute of Limitations may be held to be applicable to it. An action or "suit" has been defined by this court to be "an attempt to gain an end by legal process."

Mr. R. A. HALBERT, for the appellee:

It is said by Redfield, that in some of the American States there is no limit to the time beyond which a will can not be proved. 3 Redfield on Wills, 7, note 2.

It is held in Massachusetts that a will may be proved in the probate court after the lapse of twenty years, for the purpose of establishing a title to real estate, (*Shumway* v. *Holbrook*, 1 Pick. 114,) although a less period is limited to a grant of letters of administration. *Waters* v. *Stickney*, 12 Allen, 12; *Marcy* v. *Marcy*, 6 Metc. 370.

The case of *Fitzgerald* v. *Clancy*, 49 Ill. 465, decides only that claims against an estate can not be enforced against the realty of the decedent after seven years,—that the lien thereon is lost.

The Prerogative Court of England of course may establish a rule requiring an explanation, if the will is not presented for probate for five years; but this is in reference to wills bequeathing personalty, and does not apply to realty, as probate of wills devising realty was not required. 1 Jarman on Wills, (Rand. & Tal. ed.) 50.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

Christian Mueller died March 7, 1870. On June 11, 1883, (more than thirteen years afterwards,) Solomon Mueller, a son of the deceased, produced in the probate court of St. Clair county a paper purporting to be the last will of the deceased, which was dated March 19, 1855, and asked that it might be admitted to probate. The witnesses to the will appeared, and after hearing their evidence the court revoked letters of administration which had been previously issued, and admitted the will to probate. No question was made in regard to the genuineness of the will or the capacity of the testator to make a will, but the point presented by the record "relates to the time within which a will must be offered for probate after the death of the testator."

Section 12, chapter 148, of the Revised Statutes of 1874, entitled "Wills," requires any person who may have in his possession the last will or testament of another, immediately upon the death of the testator to deliver such will to the county court of the county. This section of the statute imposes a fine for withholding a will from the county court, and also severe punishment for willfully secreting a will. But a failure of any person who had the custody of a will, to observe this requirement of the statute, could not affect the rights of any person claiming under a will, nor the jurisdiction of the probate court to admit the will to probate upon proper proof, whenever, within a reasonable time, a will might be brought into court. Upon the death of a resident of this State, if no

will is produced and probated, letters of administration may be granted upon the estate of the deceased. But section 28, chapter 3, of the Revised Statutes of 1874, declares: "If at any time after letters of administration have been granted, a will of the deceased shall be produced, and probate thereof granted according to law, such letters of administration shall be revoked." From the reading of this section of the statute the legislature did not seem to fix upon a definite time within which a will should be presented in court and admitted to probate, and we find no section of our statute which may be regarded as a limitation law barring the probate of a will after a specified time. The legislature has seen proper to limit the time within which different causes of action may be brought in this State, but as to the probate of a will no time has been designated within which it must be done. In England no definite time is fixed within which a will should be proved. In 1 Jarman on Wills, page 218, the author, in speaking on this subject, says: "The time within which, after the testator's death, the will is to be proved, is said, in England, to be somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of the creditors and legatees, and other circumstances incident thereto." In Massachusetts, in *Shumway* v. *Holbrook*, 1 Pick. 116, it was held that a will may be proved more than twenty years after the death of the testator, in order to establish a title to real estate. In some of the States the time has been regulated by statute, but in the absence of a statute regulating the subject we are not aware of any precedent which would authorize a court in holding that a will could not be admitted to probate unless presented to the probate court within a specified time.

Within what time an action may be brought to recover a debt, or to recover the possession of lands, or within what time an action for tort may be brought, or, indeed, any action,

is purely a matter to be determined by an act of the legislature. So, also, if there is anything in the policy of the State which would require the will of a deceased person to be proved and admitted to probate within seven, ten, or any other given number of years, it is a matter to be regulated by the legislature, and not by judicial determination. It is no doubt desirable, and perhaps for the best interests of an estate, where a person dies testate, that the will should be presented to the court and probated at once; but if a will is not produced, and letters of administration issue, acts done and rights accrued under such administration will be entitled to protection, so that no serious consequences can follow from the delay in probating a will.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

JOHN CARNE, JR.

v.

JOSEPH PEACOCK.

Filed at Ottawa June 13, 1885.

1. SALE FOR TAXES—*pending an appeal.* Where an appeal is taken by the People from the judgment of the county court against lands for taxes, all proceedings under the judgment are thereby suspended until the appeal is disposed of, and a sale of the land pending such appeal will be without authority of law, and void.

2. SETTING ASIDE TAX SALE—*upon terms.* A lot was sold for the taxes thereon, by the description of "lot 9, in block 107," when it should have been described as "lot 9, in blocks 106 and 107," of a subdivision, which was chargeable with taxes: *Held*, that a court of equity, in setting aside such sale, properly required the owner to pay the sum paid for it by the purchaser at the sale, and six per cent interest thereon, as a condition of granting the relief sought.

3. APPEAL—*as to the scope of an order granting it—to whom granted.* On rendering judgment against lands and lots for delinquent taxes, the county

court entered an order "that all parties praying an appeal from this judgment file their appeal bond in the sum of $250," etc., within twenty days; and it was further ordered that in appeals by the People no bonds need be filed: *Held*, that the legal effect of such order was to grant an appeal either to the People or any land owner aggrieved by the judgment; and that where the county attorney gave notice of an appeal, and prepared and filed a bill of exceptions on behalf of the People as to certain lands, this was an appeal by the People.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. T. A. MORAN, Judge, presiding.

Mr. GEORGE W. SMITH, and Mr. JOHN P. WILSON, for the appellant.

Mr. CONSIDER H. WILLETT, and Mr. GEORGE L. THATCHER, for the appellee.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

In his bill Joseph Peacock alleges he is, and has been since 1872, the owner of certain parcels of land described, all of which had been sold for taxes for certain years mentioned, and that defendant, John Carne, Jr., now holds tax certificates, and that he will apply, as soon as the statutory period for redemption from such tax sales expires, for deeds for such property, to the county clerk, who it is alleged will make deeds to the party holding such certificates, on his application for that purpose. The judgments on which the property was sold were rendered in 1880, for the taxes of 1879 and prior years. Numerous reasons are assigned why the taxes assessed against complainant's property were illegal, and quite a number of objections are insisted upon as to the validity of the judgment and subsequent proceedings under them. The holder of the tax certificates and the county clerk were made defendants, and defendant Carne filed his answer to the bill, but the county clerk disclaimed all interest in the

subject matter of the suit. On the final hearing the court granted relief substantially as prayed for in the bill, and decreed that the tax certificates held by defendant Carne be cancelled, and be held for naught, on the payment to him by complainant of the sum found to be due for taxes and assessments paid by defendant on the property, and that the county clerk be perpetually enjoined from making to defendant any deed or deeds for the property, or any part of it, in case complainant should comply with the terms imposed by the decree on which the relief was granted. Complainant, and defendant Carne, both filed transcripts of the record in the Appellate Court and in this court, and assign errors on the same, and by stipulation the causes have been submitted in this court on the same abstracts and briefs, and are to be considered as one case.

It seems that one tract or parcel of the land was sold by an imperfect description, and as to it the court declared the certificate void on payment to defendant, by complainant, of the sum he had paid to relieve the land sold from the tax lien upon it, with interest thereon. As respects the decree touching this particular tract of land, defendant makes no complaint, but as to that portion of the decree complainant has assigned errors which will be noticed further on.

It appears the court found, as a matter of fact, that from the judgment rendered August 26, 1880, by the county court, against the lands of complainant, the People took an appeal to the Supreme Court, and as a matter of law, in consequence of such appeal no steps could be taken in regard to the property mentioned in the decree while such appeal was pending in the Supreme Court, for the collection of taxes, and that no valid sale could be made, or acts done by the collector, until such appeal should be disposed of by the Supreme Court. It was principally for that reason the court held the sales made of complainant's property during the pendency of the appeal were void; and as the court found, as a matter of

fact, complainant had no knowledge or notice of such sales so made by the collector until after the affirmance of the judgment appealed from, it was decreed that the tax sales were void, and that complainant was entitled to have the certificates set aside on payment to defendant of the amounts it was ascertained he had paid to relieve the property from liens or taxes and special assessments upon it. It is the correctness of this finding and decision of the court that is called in question by the assignment of errors made by defendant in this cause. It is thought, however, the finding and decision of the trial court in this respect are warranted both by the evidence and the law. No doubt is entertained, if an appeal was in fact taken from the decision of the county court rendering judgment for taxes against the property of complainant, that no valid sale of the property for taxes could be made during the pendency of such appeal. (Revenue act, sec. 193, as amended by the act of May, 1879.) The point insisted on, however, is, that no appeal was, in fact, taken from the decision of the county court. This, it is believed, is a misapprehension of the record. A general order was entered to permit parties to appeal. In that order it was provided "that all parties praying an appeal from this judgment file their appeal bond in the penal sum of $250," and by complying with other conditions imposed, within twenty days from the date of the judgment. And it was further ordered, "that in appeals by the People of the State of Illinois it shall not be necessary to file any appeal bonds." Where so many persons were interested in a tax judgment as in Cook county, it would be almost impracticable to enter a separate order allowing each party aggrieved an appeal, and the law requires no such thing. The legal effect of this order so entered by the court was to grant an appeal either to the People or to any land owner aggrieved by its decision. All that remained to be done by a land owner was to comply with the order of the court granting the appeal within the time limited by its

order, and his appeal would be perfected. The People were not required to file any appeal bond to perfect their appeal, neither by the order of the court nor by the statute. (Rev. Stat. chap. 120, sec. 192.) It would seem to follow, then, that all the People had to do to perfect their appeal would be to give notice of such appeal, and file the usual bill of exceptions or certificate of evidence within the time fixed by the court. That was done in this case. There is evidence the county attorney gave notice he would take an appeal from the decision of the county court to the Supreme Court, and on the 15th day of September, 1880, a bill of exceptions was prepared and filed on behalf of the People, so far as the lands of complainant were concerned. Afterwards it was agreed in open court, between the county attorney and the attorney for complainant, that an order might be entered *nunc pro tunc*, as of the 26th day of August, 1880,—that being the day on which the judgment was rendered,—to the effect the appeal prayed for by the People as to the property of the complainant might be taken to the January term, 1881, of the Supreme Court, in the Central Grand Division, and in pursuance of that stipulation it was ordered by the court the appeal prayed for be allowed to that term of the Supreme Court. Accordingly the case was taken to the Supreme Court in the Central Grand Division, as in the case of an usual appeal, and is reported as *The People* v. *Peacock*, 98 Ill. 172. It appears notice was given at the time the decision was rendered that an appeal would be taken on behalf of the People, and that is sufficient. A bill of exceptions, so far as the property of complainant is concerned, was filed within the time fixed by the order of the court. That completed the appeal, as no bond was required. The order entered *nunc pro tunc*, if it had no other effect, was sufficient to enable the parties to submit the case, as was done, in the Central Grand Division. So, then, it appears the appeal was, in fact, pending, as the circuit court found, when the tax sales were made, and as the

appeal operated, under the statute, to suspend all further proceedings, the law is, the sales were without authority of law, and are void.

The errors assigned by complainant question the finding of the court that there were tax liens on that portion of lot 9, in Stowell's subdivision of the north part of blocks 106 and 107, owned by complainant, and also the order of the court requiring complainant to pay the amount bid at the tax sale, with six per cent interest from the date of sale, as a condition of relief. Other errors assigned are of no importance.

As respects the first error indicated, it is said the money received from defendant could not have satisfied any tax liens on lot 9, in Stowell's subdivision, owned by complainant. There is no doubt this lot 9 was sold by an incorrect or imperfect description. It seems it was described as "lot 9, in block 107," when, in fact, it should have been as "lot 9, in blocks 106 and 107," of that subdivision. Although not correctly described, it sufficiently appears the property sold is the same property owned by complainant, and the money paid by defendant did, in fact, discharge the tax liens upon his property, and in that way preserved it for complainant. It was money complainant ought, under the law, to have paid himself, and as he has had the benefit of money paid by defendant, he ought, in all good conscience, to be required to repay it.

Nor was there any error in the decision of the court requiring complainant to pay interest on the amounts bid at the tax sales, as a condition on which relief should be granted. The terms imposed are both just and reasonable.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

WILLIAM C. RITCHIE *et al.*

v.

WALTER L. PEASE.

114 353
127 405
114 353
41a 85
114 353
157 578

Filed at Ottawa June 13, 1885—Rehearing denied September Term, 1885.

1. CONFLICT OF JURISDICTION—*power of State courts to correct mistakes in decrees of Federal court.* A State court is not empowered to review the judgments, decrees and orders of a United States District Court, and rectify the errors therein.

1. PAROL EVIDENCE—*to identify land under a misdescription in a deed.* A deed of an assignee in bankruptcy described the property as lot 9, block 28, Fort Dearborn addition to the city of Chicago, subject to all incumbrances thereon, when there was, in fact, no such lot in existence. The description was sought to be aided by parol evidence of the knowledge and intention of the assignee and the purchaser, and make the same apply to lot 28, block 9, etc.,—the proper description: *Held*, that there was no latent ambiguity, and that the parol evidence could not render the deed operative to pass the bankrupt's title, which still remained in the assignee.

3. Where land is described by an impossible description, and also as the property of a person named, in a given locality, the first part of the description may be rejected, and parol evidence received to show what property answers the latter description.

4. Where a deed purports to convey all of a person's right, title, interest or claim in a piece of property, which, from the terms used to describe it, can have no existence, it can not be regarded as an assertion of ownership of any specific property, and can not be aided by parol evidence.

5. MISTAKE—*of deed of officer of court—correcting as against creditors.* It does not follow that a deed of an assignee in bankruptcy will be rectified in equity merely because of a mutual mistake between the assignee and the purchaser as to the description of the land attempted to be sold. The creditors of the bankrupt have an interest in the question. In such case the bankrupt court may order the proper land to be sold by its correct description.

6. CLOUD ON TITLE—*complainant must have the title.* On bill to set aside a deed as a cloud upon the title to complainant's land, it is incumbent on him to prove title in himself when that is put in issue by the answer. It is not sufficient that the defendant's claim is under a merely colorable title.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS A. MORAN, Judge, presiding.

Statement of the case.

On the 24th of December, 1880, Stephen L. Inslee filed his bill in chancery in the circuit court of Cook county, wherein, among other things, he alleged that on August 28, 1878, Walter L. Pease was the owner of lot 28, in block 9, in Fort Dearborn addition to Chicago, subject to a mortgage to the United States Mortgage Company, dated July 12, 1877, to secure $18,000, etc., and subject also to judgments hereinafter mentioned; that on the said 26th day of August, 1878, Pease was adjudicated a bankrupt by the United States District Court for the Northern District of Illinois; that Albert T. Lewis was duly appointed as assignee, and received a deed of assignment from A. B. Coon, one of the registers, of all Pease's estate, real and personal, and that such deed was duly recorded; that in his schedule of assets Pease inventoried said real estate as lot 9, block 28, etc., subject to a trust deed dated July 12, 1877, to the United States Mortgage Company, to secure, etc.; that on October 11, 1878, Lewis, as assignee, filed a petition for leave to sell said real estate described as lot 9, block 28, of Fort Dearborn addition to Chicago, subject to said incumbrance, and that thereupon an order was entered directing such sale and notice in the "Elgin Advocate," and by mail to creditors; that notice was duly given, and on November 2, 1878, the assignee offered the premises at public vendue, and Inslee became the purchaser; that on November 9, 1878, the assignee made report of sale, and that the sale and all proceedings thereunder were duly confirmed; that Lewis made an assignee's deed, dated November 9, 1878, thereby conveying all Pease's interest, as well as the assignee's, to Inslee, which deed was recorded November 21, 1878, and that Inslee thereby became owner of said lot 28; that on October 29, 1879, the sheriff of Cook county sold said premises at sheriff's sale under an *alias* execution, which purported to have been issued out of the Superior Court of Cook county, on June 28, 1879, upon a judgment rendered against Pease and others, and in favor

of Robert B. Chisholm; that at said sale Inslee became the purchaser of said lot 28, for $10, and the usual sheriff's certificate of sale was issued to him; that Wells, Norton & Walker pretended to redeem from said sheriff's sale, by virtue of some pretended judgment and execution against Pease, and complainant charges that said pretended redemption was irregular, illegal and void, and that Wells, Norton & Walker had or possessed no right in the premises to make such or any redemption; that the sheriff afterwards executed a pretended deed to Wells, Norton & Walker, dated November 29, 1880, recorded, etc., and that Wells, Norton & Walker quitclaimed to Ritchie, by deed dated November 30, 1880, recorded December 8, 1880, and that Ritchie now claims title; that the pretended sheriff's deed to Wells, Norton & Walker, and said quitclaim to Ritchie, by reason of having been recorded, are clouds upon complainant's title. The bill prays that said deeds to Wells, Norton & Walker, and to Ritchie, be set aside, and declared void as against complainant, as clouds, and that said deed of the assignee to complainant be decreed to have passed the title of the assignee and said bankrupt in said lot 28, etc.

On the 12th of February, 1881, said Inslee, by leave of the court, filed an amended and supplemental bill, alleging the execution of a deed by the defendant Ritchie to Francis T. Wheeler, January 14, 1881, and the commencement of an ejectment suit by Wheeler, against Inslee and his tenants, on the 18th day of January, 1881, in the Superior Court of Cook county, and making Wheeler a party defendant, and asking that he be enjoined from further prosecuting said ejectment suit. On June 18, 1881, the bill was further amended by alleging that Pease, the bankrupt, obtained his discharge in bankruptcy on the 22d of January, 1879, and that the said judgment so obtained by said Wells, Norton & Walker was a provable claim against the estate of said bankrupt, and that the issuing of an execution thereon, and all proceedings there-

under, were void. On the 14th of June, 1883, the death of complainant Inslee was suggested, and on July 12, 1883, a bill of review was filed by Mary Voorhees, Margaret G. Owens and William Inslee, heirs-at-law of the complainant Inslee. On the 27th of May, 1884, the said heirs-at-law filed their amended bill of review, and on the 2d day of October, 1884, on motion of counsel for the heirs-at-law of said Inslee, said Walter L. Pease was substituted as complainant in place of said heirs, and he filed his amendment to said bill of review, alleging that in the lifetime of Inslee,—that is to say, on the 16th of March, 1883,—said Inslee conveyed the property in question to him, and that he then thereby became the owner thereof, and that after the recovery of the judgment by the said Wells, Norton & Walker, on the 22d of January, 1879, he was discharged in bankruptcy from all debts and claims against his estate which existed on the 26th day of August, 1878, and praying that the original bill, and the bill of review, as amended, be taken as amended by such allegations, etc. Answers were filed to the bill, amended and supplemental bills, and amended bills of review.

The court ordered that Pease be substituted in place of the heirs-at-law of Inslee, and, on final hearing, the court finds that Pease was the owner in fee of said lot 28 on and prior to August 28, 1878; that on that day he filed his bankruptcy petition; adjudication of Pease on the 29th of August, 1878; appointment of Lewis as assignee, and assignment by the register to Lewis, including said lot 28, and vesting all Pease's title in Lewis by such assignment; that on October 11, 1878, Lewis, as assignee, filed his petition to sell said real estate; order for sale of said real estate by the district court, upon specified notice, which the court finds was duly given, and that on November 2, 1878, the assignee offered and sold said real estate to Inslee; approval and confirmation of said sale on November 9, 1878, by said district court, and deed by the assignee on the same day to Inslee, conveying said premises;

that in making the sale, Lewis intended to sell lot 28, etc., and that Inslee intended to purchase, and supposed he was purchasing, said lot; that the assignee's deed should be reformed and corrected, so that the description shall read, or be decreed to have the same force and effect as though said description did read, lot 28, etc.; that the allegations of the bill with relation to the issuing of the sheriff's deed to Wells, Norton & Walker, and the deed by them to Ritchie, and the deed by Ritchie to Wheeler, and the recording of said deeds, are true, and that each of said three deeds is a cloud; that Inslee, on March 16, 1883, deeded to Pease, and that Inslee's title passed to Pease by said deed, and that Pease is entitled to the money in the hands of the receiver, after payment of costs and expenses; decrees that the title to said lot 28, etc., passed by the assignee's deed to Inslee, and that Inslee conveyed said lot to Pease by his deed of March 16, 1883, and that the certificate of redemption to Wells, Norton & Walker, and the sheriff's deed to them, and the quitclaim deed from them to Ritchie, and the deed from Ritchie to Wheeler, be set aside, and declared null and void as against Pease, his heirs and assigns, as clouds; decrees costs of suit against Ritchie and Wheeler; further decrees that Pease is the owner of and entitled to the money in the receiver's hands after payment of costs, expenses and compensation of the receiver, and orders and directs the receiver to pay to Pease, and take his receipt, and make final report, etc., and retains the cause upon the docket as to the receiver's report and discharge. The errors assigned question the correctness of the ruling of the court in thus decreeing.

Messrs. DUPEE, JUDAH & WILLARD, and Mr. FREDERIC ULLMANN, for the appellants:

The conveyance of lot 9, block 28, passed no title to lot 28, block 9. There was no such lot as that first named, in existence.

To sustain a grant, extrinsic evidence is admissible to identify and establish the basis of the call in the deed. But where, as a consequence of a mistake, a deed does not express the intention of the parties, and describes what was not intended, and fails to describe what it was intended to describe, it must be rectified by a court of equity before it can become operative. *Bridge Co.* v. *Curtis*, 103 Ill. 410; *Shackleford* v. *Bailey*, 35 id. 381; *Smith* v. *Crawford*, 81 id. 296; *Colcord* v. *Alexander*, 67 id. 247; *Carter* v. *Barnes*, 26 id. 454.

The assignee's sale was a judicial sale. (Rorer on Judicial Sales, secs. 1, 12; *Stevens* v. *Houser*, 39 N. Y. 306.) He could sell only by virtue of the order of the bankrupt court. (*Ziegler* v. *Shomo*, 78 Pa. St. 363.) That court has power to confirm or set aside the sale. *In re Barrow*, 1 B. R. 481; *In re Troy Woolen Co.* 4 id. 629; 8 Blatchf. 465; Bump on Bankruptcy, 564.

The assignee is an officer of the court. (*In re Blaisdell*, 6 B. R. 78.) If the assignee sells what he is not directed to sell, the sale is invalid. *Warren* v. *Homestead*, 33 Maine, 256.

At a judicial sale the deed can only pass the title authorized by the decree to be sold. Rorer on Judicial Sales, 379; *Ryan* v. *Dox*, 25 Barb. 440; *Shriver* v. *Lyman*, 2 How. 43.

Our court can not correct the mistakes made in the orders and decrees of another tribunal. *Ward* v. *Brewer*, 19 Ill. 291. See, also, *Klokke* v. *Stanley*, 109 Ill. 192.

If the circuit court had the power to reform the deed of the bankruptcy court, there are no equities in the complainant entitling him to relief. *Altes* v. *Hinckler*, 36 Ill. 267.

The Federal court still has a supervisory power over its records, and the acts of its officers, and of this sale, and of the bankrupt's property, and is the proper court in which to seek relief. Bankrupt act, sec. 5062; *Sproehnle* v. *Dietrich*, 110 Ill. 202; *Logan* v. *Lucas*, 59 id. 237.

Mr. MELVILLE W. FULLER, and Messrs. COOK & UPTON, for the appellee:

A devise or grant of land will only be declared void for uncertainty, where, after resort to oral proof, it still remains a matter of mere conjecture what was intended by the instrument. *Colcord* v. *Alexander*, 67 Ill. 581; *Choteau* v. *Jones*, 11 id. 300; *Williams* v. *Warren*, 21 id. 541; *Warden* v. *Williams*, 24 id. 67; *Dickenson* v. *Breeden*, 30 id. 279; *Townsend* v. *Downer*, 23 Vt. 225.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The decree below must be reversed. The deed by the assignee in bankruptcy to Inslee can convey no title without rectification, and a State court is not empowered to review the decrees, judgments and orders, and rectify the errors therein, of a United States District Court. These propositions seem so self-evident that but little need be said in their support.

The material facts are, Walter L. Pease was, on the 28th of August, 1878, the owner of lot 28, in block 9, in Fort Dearborn addition to Chicago. On that day he filed his voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois. In his schedule of assets attached, he inventoried lot 9, in block 28, Fort Dearborn addition to Chicago, instead of the lot which he owned. On the following day he was adjudged a bankrupt, and at a subsequent time Albert T. Lewis was appointed his assignee, and, in compliance with the Bankrupt act, a deed of assignment conveying all the bankrupt's effects was issued to him on the 7th of October, 1878. On the 11th of October, 1878, Lewis, as such assignee, filed in the same court by which he was appointed, his petition for leave to sell certain assets of the bankrupt, describing them, among which he enumerated lot 9, in block 28, Fort Dearborn addition to Chicago, "subject to an incumbrance secured by note and trust deed, bear-

ing date July 12, 1877, etc., given to secure $18,000 in gold, to United States Mortgage Company, —— years after date, with interest at nine per cent." The court, on the same day, ordered the assignee to sell the property mentioned in the petition at public auction, after giving three weeks' notice in the "Elgin Advocate," etc. The notice published described "all the right, title and interest of said bankrupt, or the undersigned, as assignee, in and to all the following described property, subject to all existing liens and incumbrances, to-wit: lot 9, of block 28, of Fort Dearborn addition to Chicago, Cook county, Illinois." On the 9th of November, 1878, the assignee made report to the court, accompanying which was a copy of the notice published, and in the report he showed that he had sold the "bankrupt's certain right or equity in and to lot 9, of block 28, of Fort Dearborn addition to Chicago, Cook county, Illinois, to Stephen L. Inslee, for five dollars." The district court approved the sale on the 9th of November, 1878, and on the same day the assignee conveyed to Inslee "all the right, title, interest, estate, claim and demand of the said bankrupt which he had on the said 28th day of August, A. D. 1878, and of the said Albert T. Lewis, as assignee aforesaid, (subject to all unpaid taxes, and to all liens and incumbrances, unless by the terms of said sale expressly excepted,) in and to the following described real estate, to-wit: lot nine (9), of block twenty-eight (28), of Fort Dearborn addition to Chicago, Cook county, Illinois."

There is no such property anywhere as lot 9, in block 28, of Fort Dearborn addition to Chicago. But it is contended that parol evidence is admissible for the purpose of explaining and correcting the mistake, and that it has been held in *Colcord* v. *Alexander*, 67 Ill. 581, that a description will be held sufficient which can be rendered certain by parol proof, and evidence was offered and admitted that this property was known as "No. 53 State street, in Chicago," both to Lewis, the assignee in bankruptcy, and to Inslee, the purchaser, at

the time of the sale, and, indeed, that they knew it by no other description. This is quite competent to prove a mistake in the description of the property as conveyed, and that the property which the assignee intended to sell, and which Inslee intended to buy, was not the property which the deed assumes to convey, but was, in fact, lot 28, in block 9, of Fort Dearborn addition to Chicago. It could hardly be seriously contended, however, that a deed conveying one piece of property, or assuming to convey property of which there is no existence, can be held a sufficient conveyance of a piece of property of another description, merely because it may be shown by parol that the parties mutually intended, the one to sell, and the other to buy, and they actually thought the one was selling and the other buying a piece of property of the latter description. Parol evidence is admissible in the case of a latent ambiguity, and to identify and establish the objects of the calls in a deed, as in *Colcord* v. *Alexander*, *supra*. In that case property was sold as the property of Lansing & Ostrom, and it was held parol evidence was admissible to identify the property in controversy as answering to that description. So here, had this property, in addition to the descriptive words here used, been described as the property of Pease, in a given locality, the impossible description might have been rejected and parol evidence admitted to show what property answered to this description; but "all of a person's right, title, interest or claim," in a piece of property which, from the terms used to describe it, can have no existence, is an assertion of no ownership of any specific property. It is impossible that the deed can derive any aid from the mortgage, because, first, it makes no reference whatever to the mortgage, and so there is no principle upon which the mortgage can be read as a part of the deed; and second, because there is, in fact, no such mortgage as that referred to in the schedule of Pease. The only mortgage of which there is any evidence is one dated July 12, 1872,—five years

before that described in the schedule,—for $20,000, instead of $17,000, as described in the schedule.

There is no latent ambiguity, and the difficulty is not in establishing the objects and calls in the deed. There is no property answering the description in the deed, and the words "lot 9, in block 28," being rejected, no objects or calls are left which can be applied to any property. The error in the description commenced with the schedule, and was continued in the petition, notice and order and confirmation of sale, in the United States District Court. The power to execute the deed was derived from that court. The property was that of a bankrupt, and no State court was therefore empowered to deal with it. We perceive no reason why that court may not still subject that property to sale for the payment of the debts of the bankrupt; but certainly this court can not sit as a court of review to rectify and amend the errors of that court, and this deed can not be rectified unless that shall be done. *Logan* v. *Lucas*, 59 Ill. 237; *Sproehnle* v. *Dietrich*, 110 id. 202.

We may observe it does not follow there should be rectification merely because the mistake was mutual between the assignee and the purchaser. The creditors have an interest in the question. The fact that the property decreed to be sold, and advertised to be sold, had no existence, may have been a reason why more money was not bid at the sale. It by no means follows that no one else would have bid had the property which the bankrupt really owned been decreed and advertised to be sold.

The decree is reversed and the cause remanded.

Decree reversed.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

PER CURIAM: A petition for rehearing has been presented, in which it is insisted that the appellants are in nowise prejudiced by that portion of the decree which we have held to

be erroneous. In our opinion this is a misapprehension. Undoubtedly it is, before suit brought, a matter of indifference to a party having only a colorable title, in whom is the real title; but a party in possession under a colorable title is entitled to hold that possession against all the world except those who establish a better title, and possession under a colorable title may ripen, by the lapse of time, accompanied by payment of taxes, into an absolute title. To maintain a bill to remove a deed as a cloud upon a title, where the title of the complainant is put in issue by the answer, the complainant must prove title in himself. (*Wing* v. *Sherrer*, 77 Ill. 200; *Emery* v. *Cochran*, 82 id. 65; *Hutchison* v. *Howe*, 100 id. 11.) Here, the title of the complainant, Pease, is put in issue by the answer. It is expressly denied that any title passed by the assignee's deed to Inslee, and by Inslee's deed to Pease. Without the erroneous decree declaring title in Pease, he has no standing in court. By virtue of it he has a decree, which he could not otherwise have, divesting appellants of the possession of property to which they are entitled as against everybody but the assignee in bankruptcy. It can not be pretended that in this proceeding, if a decree had not gone in favor of Pease, it would have gone in favor of the assignee in bankruptcy divesting their possession, because no pleadings in the record authorize such a decree. The appellants are decreed to pay costs, when, but for the error in declaring title in Pease, he would have been decreed to pay the costs. Appellants are therefore directly and materially prejudiced by the erroneous decree.

The case made is certainly one wherein, if it had been in reference to a mere private transaction, by which one person was attempting to convey land to another, a court of equity would, on proof, correct the mistake. But we think it very clear that no legal title to lot 28 passed by the assignee's deed to Inslee.

The rehearing is denied.

Rehearing denied.

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MARY C. ZIMMERMAN

v.

ELIJAH A. WILLARD *et al.*

Filed at Mt. Vernon June 13, 1885.

1. PLEADING—*as to mere matters of evidence.* It is not proper for a pleader to plead mere matters of evidence in any case.

2. SAME—*alleging fraud in deed of assignment for benefit of creditors.* To an interpleader by an assignee for the benefit of creditors, filed in a suit by attachment against the assignor and another, who were sued as partners, claiming the property attached and the debts garnisheed as having passed under the assignment for creditors, the attaching creditor replied that the deed of assignment "was executed, made, had and contrived by the said grantor therein, of his fraud and covin, with the intent and purpose to delay, hinder and defraud his creditors," etc. The court sustained a demurrer to the replication: *Held*, that the replication was good in both substance and form. The pleading was not obnoxious to the objection that it stated the mere conclusion of the pleader, and not the facts constituting the fraud. The making of the deed of assignment, and the fraudulent intent, were the two facts essential to the defence, and they were distinctly averred.

3. ASSIGNMENT FOR THE BENEFIT OF CREDITORS—*of the place where deed may be acknowledged—the statute construed.* A deed of assignment by a failing debtor to assignees, for the benefit of creditors, is not required by the statute to be acknowledged in the county where the grantor resides, but must be there recorded. The words in the first section of the act of 1877, that "every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside," do not require the deed to be acknowledged at the county of the grantor's residence. There should be a comma after the word "acknowledged."

4. SAME—*sufficiency of certificate of acknowledgment.* A certificate of the acknowledgment of a deed by a debtor, of his lands, etc., for the benefit of creditors, which stated that the grantor was personally known to the officer, and that he appeared before such officer and made the acknowledgment of the deed, is substantially good, as sufficiently showing that the grantor did appear in person before the officer, at least under the act relating to voluntary assignments.

5. SAME—*if in fraud of creditors—of the right to attack the assignment after county court has assumed jurisdiction.* If the assignment by a debtor for the benefit of certain of his creditors is made for the purpose of defrauding certain other of his creditors, it will be void as to the latter; and the fact that the county court has assumed jurisdiction of the subject matter

of the assignment, and appointed new assignees, will not prevent creditors so attempted to be defrauded from attacking the deed for fraud, in a collateral proceeding, when it is sought by it to withdraw property attached by them, and place the same in the hands of the assignees appointed by the court.

6. WITNESS—*competency—grantor in deed of assignment for benefit of creditors.* A debtor who makes a voluntary assignment of his property for the benefit of creditors, is a competent witness, on the trial of an interpleader interposed by his assignee in an attachment suit against him and another, to show that he alone owned the property attached, and therefore that it belonged to the assignee, and was not subject to attachment.

7. ERROR *will not always reverse—ruling that a good pleading is bad, when there are issues on other pleadings equally availing.* It is sufficient in any case that there is one issue under which a given defence may be proved. Therefore a reversal will not be given for sustaining a demurrer to a good plea or replication, where the evidence is admissible, and has been heard under some other issue.

APPEAL from the Appellate Court for the Fourth District; —heard in that court on appeal from the Circuit Court of Union county; the Hon. O. A. HARKER, Judge, presiding.

This case originated in an action by attachment, brought by Mary C. Zimmerman, against Elijah A. Willard and G. W. Patterson, as partners. Prior to this suit Willard had made an assignment of all his real and personal estate to certain persons, for the benefit of his creditors. They having failed to qualify and serve, the county court of Union county appointed Philip V. N. Davis and William C. Rich in their place. These assignees appeared in the attachment suit, and interposed an interpleader, alleging that the money in the hands of the garnishees did not belong to Willard & Patterson, but was the individual property of Willard. The plaintiff traversed this plea in the usual form, and, by leave, filed a special replication, as follows:

"And the said plaintiff, by leave of the court for that purpose first had and obtained, as to the said plea of interpleader of said Philip V. N. Davis and William C. Rich, as assignees of the said Elijah A. Willard, saith, that by reason of anything in the said plea of interpleader set forth and alleged,

she ought not to be barred or hindered from the further having or maintaining her aforesaid action and her rights and remedies against the said Willard & Patterson, and against the property, rights, debts and credits attached, seized and taken by her said writ of attachment, and claimed by the said Rich and Davis in and by their said plea of interpleader, as therein set forth; because she says that the said supposed assignment by the said Elijah A. Willard, on the 18th day of July, A. D. 1882, mentioned in the said plea of interpleader of the said Philip V. N. Davis and William C. Rich, in this behalf, was executed, made, had and contrived by the said Elijah A. Willard, of his fraud and covin, with the intent and purpose to delay, hinder and defraud his creditors of their just and lawful actions and suits against the said Elijah A. Willard, and was and is utterly void and of no effect as against the said plaintiff, to-wit, at the county aforesaid. And this she is ready to verify," etc.

To this special replication the court sustained a general demurrer, and the plaintiff elected to abide by her replication.

Mr. A. D. DUFF, and Mr. W. J. ALLEN, for the appellant:

The deed of assignment was not admissible in evidence. The act of 1877 (section 1,) required it to be acknowledged in Union county. The statute is peremptory. *Hardman* v. *Bowen*, 5 Abb. (N. S.) 332; 39 N. Y. 196; *Cook* v. *Kelley*, 12 Abb. 35; 14 id. 466.

Laws in relation to assignments are strictly construed. *Heacock* v. *Durand*, 42 Ill. 232.

The certificate of acknowledgment is not in conformity with law. Section 26, chapter 30, of the Revised Statutes, prescribes the form, which must be substantially complied with. The officer must not only certify that the party whose name is signed to the deed "is personally known to him," but also that he who is so personally known to him "appeared before him in person and acknowledged," etc. The

notary here simply states that Willard "appeared before him July 18, 1882, and is personally known to him to be the same person whose name is subscribed to the deed." *Tully* v. *Davis*, 30 Ill. 108; *Shepard* v. *Carriel*, 19 id. 319; *Short* v. *Candee*, 28 id. 227.

Fraud vitiates all contracts, both at law and in equity, (*Whitney* v. *Roberts*, 22 Ill. 381,) and is cognizable in a court of law. *Jamison* v. *Beaubien*, 3 Scam. 113.

It is for the jury to determine whether an assignment is made in good faith or not. *Wilson* v. *Pearson*, 20 Ill. 81; *Nimmo* v. *Kuykendall*, 85 id. 476; *Hays* v. *Barnard*, 38 id. 297.

The special replication does not state a conclusion of law, but a fact, and the only fact necessary to be stated in such a replication. The intent with which the deed is alleged to have been made, is a traversable fact. That it contains all that is necessary, and is formal, see 1 Chitty's Pleading, 537; 3 id. 1168; Bump on Fraudulent Conveyances, 581, 582; *Boies* v. *Henny*, 32 Ill. 130.

There being no plea in abatement denying the partnership of Willard & Patterson, their evidence was not admissible to show there was no partnership, there being no such issue. *Warner* v. *Chambers*, 12 Ill. 124; *McKinney* v. *Peck*, 28 id. 177; *Degan* v. *Singer*, 41 id. 28; *Shufeldt* v. *Seymour*, 21 id. 524; *Zuel* v. *Bowen*, 78 id. 234; *Field* v. *Flanders*, 40 id. 470.

Mr. W. S. DAY, and Messrs. BARR & LEMMA, for the interpleaders:

The words of location in section 1 of the act of 1877, refer only to the recording of the deed.

The county court having assumed jurisdiction of the trust funds and property, can not be divested of it in this way. *Freydendall* v. *Baldwin*, 103 Ill. 325; *People* v. *Gray*, 72 id. 344.

The certificate of the acknowledgment of the deed is substantially good. The replication states no facts, but merely

a conclusion of the pleader. When fraud is set up, the facts constituting it must be stated. *Jones* v. *Albee*, 70 Ill. 34; *Davis* v. *Pickett*, 72 id. 484.

Charges of fraud and usury should not be general, but the facts distinctly stated on which the charges are based. *Newell* v. *Board of Supervisors*, 37 Ill. 253; *Shafer* v. *Davis*, 13 id. 395; *Hovey* v. *Holcomb*, 11 id. 660.

The appellant made only a general objection to the evidence of Willard & Patterson. If evidence is obnoxious to a special objection, it must be stated. *Railroad Co.* v. *Estes*, 96 Ill. 473; *Sargent* v. *Kellogg*, 5 Gilm. 81; *King* v. *Railroad Co.* 98 Ill. 377.

If the appellant fails to make the objection in the court below, so as to give an opportunity to obviate it by amendment of the pleadings, he will be held to have waived it. *City of Elgin* v. *Kimball*, 90 Ill. 356; *Driver* v. *Lord*, id. 599; *Druggers* v. *Bell*, 94 id. 225; *Stone* v. *Oil Co.* 41 id. 91; *Roberts* v. *Graham*, 6 Wall. 578; Rev. Stat. chap. 110, sec. 24.

Mr. CHIEF JUSTICE MULKEY delivered the opinion of the Court:

For several years next before July, 1882, Elijah A. Willard carried on the banking business at Jonesboro, Union county, this State. He was also, during the same time, engaged in the buying and shipment of grain at different points in the State, but principally in Union and Jackson counties. His operations in the grain trade were carried on mainly through G. W. Patterson, who resided on a farm belonging to Willard, near Makanda, in Jackson county, some fourteen miles distant. In July, 1882, Willard failed, and went to Mexico, where he has since resided. On his way there he passed through the city of St. Louis, where he executed and acknowledged, before a notary of that city, a deed, apparently in due form, bearing date July 18, 1882, whereby he conveyed to Thomas Hileman, Daniel Hileman and Charles F. Willard,

all his estate, both real and personal, for the benefit of his creditors. This deed was sent by mail to the grantees in Union county, and was there received by them, and properly recorded on the 22d of the same month. The grantees having afterwards declined to assume the trust, by a proper proceeding in the county court of Union county Philip V. N. Davis and William C. Rich, Sr., appellees, were, on the 24th of July, 1882, duly appointed assignees in their stead, and thereupon entered upon the duties of the trust. On the 9th of September following, Mary C. Zimmerman, the appellant, and a number of other creditors of Willard, proceeding upon the hypothesis that Patterson was a partner with Willard in the grain business, sued attachments out of the circuit court of Jackson county against the estate of the said Willard & Patterson. These writs were served upon a number of commission merchants in the State, as garnishees, whose answers show that they, collectively, had in their hands some $3000 due Willard, or Willard & Patterson, as the case might be, on account of wheat transactions between them. Pending these attachment proceedings, Davis and Rich, the assignees, appeared in court and filed interpleaders, claiming that the money in the hands of the garnishees was the individual property of Willard, and consequently passed to them by virtue of the deed of assignment. The attaching plaintiff in the present case denied, generally, the allegations of the interpleader, and also replied specially that the deed of assignment through which appellees claim "was executed, made, had and contrived by the said Elijah A. Willard of his fraud and covin, with the intent and purpose to delay, hinder and defraud his creditors," etc. To this replication the court sustained a general demurrer, and the cause was then submitted to a jury upon the issue tendered by the interpleader, resulting in a verdict in favor of appellees, upon which the court rendered final judgment. From this judgment there was an appeal to the Appellate Court for the Fourth District,

where the same was affirmed. The present appeal is from the judgment of the latter court.

The ruling of the court upon the demurrer to the special replication to the interpleader presents the first question for consideration. It is first objected that the replication states a mere conclusion of the pleader, and not the facts constituting the fraud, as it should do. This is a misapprehension. While we fully recognize the general rule adverted to by counsel, yet in applying it there is another general rule that must not be lost sight of, namely, that it is not proper to plead mere matters of evidence in any case. It may be difficult in some cases to apply these well recognized rules of pleading,—and this, indeed, is conceded by the most authoritative text writers; yet we perceive no difficulty in applying them in the present instance. The fraud relied on here is not, as is generally the case, to be inferred from a great variety of issuable facts to be proven on the trial. It differs from other cases in this respect, however, only in the paucity of the issuable facts from which the fraud is to be inferred. The defence here consists of two facts, namely, the making of the deed, and the alleged illegal or fraudulent intent with which it was done. Both these facts are distinctly averred, and present triable issues, and this is all the law requires.

We have examined with care all the cases cited by appellees' counsel which are supposed to be inconsistent with the conclusion here reached, but we find nothing in them that, in our judgment, warrants such an inference. It is true the language of the opinions in some of them is quite broad, yet when limited, as it must be, to the facts in the particular case, it is entirely consistent with the conclusion here reached. Most of the cases in this court bearing upon the question are mainly based upon *Hovey et al.* v. *Holcomb et al.* 11 Ill. 660. But even in that case, which may be regarded as the leading one on the subject in this State, this court holds the following language: "It may sometimes be a sufficient averment

of fraud to say that a certain specified act was fraudulently done, or that it was fraudulent, without showing how it was fraudulent." The case in hand evidently falls directly within the class of cases here alluded to.

As to the form of the replication, it is in strict conformity with the precedents, and we see no objection to it in that respect. 3 Chitty's Pleadings, *1168.

It is further objected that the deed of assignment, having been properly filed and recorded in the county court, and that court having necessarily recognized its validity in appointing new trustees under it, its validity can not be questioned in a mere collateral proceeding, as is sought to be done here; that by reason of such action of the county court its validity became *res judicata*, and hence it can only be attacked by a direct proceeding for the purpose of setting it aside. We do not concur in this view, nor do we think the authorities cited by counsel in its support sustain it, and there is certainly nothing in the statute that justifies such a conclusion. It is clear appellees' right to the attached property depended solely upon the validity of the deed of assignment, and it is equally clear that if it was made, as is alleged in the replication, with the intent to defraud the creditors of Willard, it was void and inoperative as to such creditors. We are therefore of opinion the replication presented a valid defence to the case made by the interpleader, and that the court erred in sustaining the demurrer to it. Nevertheless, we do not think the judgment should be reversed for that reason. Under the general traverse of the interpleader the appellant had the right to prove any fact which could properly have been given in evidence under the special replication, and she could not therefore have been injured or prejudiced by the ruling of the court upon the demurrer. It is sufficient in all cases that there is one issue in the cause under which a given defence may be proven. That was the case here. *Zirkel* v. *Joliet Opera House Co.* 79 Ill. 334.

The point is also made that the court erred in admitting the deed of assignment in evidence, against the objections of appellant. The grounds of the objection are two-fold: First, that the deed was acknowledged outside of the State; and second, that the certificate of acknowledgment is insufficient in this, that it does not state the grantor appeared before the notary *in person*. The first section of the act of 1877, under which the assignment was made, provides, among other things, that "every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside," etc. The deed in question was, as we have already seen, duly recorded in Union county, where Willard resided; but the contention of appellant is, that it should also have been acknowledged there. We do not think that this is a fair or reasonable construction of the language cited. While the object of the legislature in requiring the deed to be recorded in the county where the assignor resides, etc., is quite apparent, yet no possible reason is perceived for requiring it to be acknowledged there. The place of acknowledgment would therefore seem to be wholly inconsequential, and to limit it to a particular place would certainly, in many cases, lead to great inconvenience, and in some would probably operate as a denial of the right of a failing debtor to make such an assignment at all. A construction which would lead to such results ought not to be adopted unless the statute plainly and imperatively demands it. We do not think it does in this case. Had a comma been inserted after the word "acknowledged," as it should have been, no one would have thought of that word being limited by the qualifying member of the sentence, "*in the county where the person or persons making the same reside,*" etc., and we are of opinion that sound reason and public convenience alike require the provision in question to receive the same construction as if the comma had been so inserted. We therefore hold that the requirements of the statute were fully met by the recording

of the instrument in Union county,—the place of Willard's residence.

In respect to the sufficiency of the acknowledgment, we do not deem it necessary to enter into an elaborate discussion of the question, or upon a review of the authorities relating to it, but will content ourselves with stating, in general terms, that we regard the certificate sufficient. It states that Willard was personally known to the notary, and that he appeared before such notary and made the acknowledgment in question. We think the fair inference is, that the party making the instrument did appear in person before the notary, though it is not expressly so stated in the certificate; and without expressing any opinion as to whether this would be sufficient under our Conveyance act, we have no hesitancy in holding, as we do, that it is a substantial compliance with the act relating to voluntary assignments.

It is further objected that the court erred in admitting the deposition of Willard in evidence, for the purpose of proving that the moneys attached belonged to him individually, and not to him and Patterson, as partners. The argument is, that Willard & Patterson having been sued as partners, and the existence of the partnership being admitted by them upon the record, Willard could not, on his own behalf, introduce evidence to disprove it, and as the assignees claim through him as mere volunteers, they have no rights in this respect which he himself could not exercise. The argument is manifestly unsound. It leads to this: that one, after having made a valid assignment of his property for the benefit of creditors, might, by failing to make a proper defence when sued by a stranger in respect to it, defeat the assignment altogether. It is not within the power of the insolvent debtor in such case, by any action or non-action of his, in pleading or otherwise, to defeat the claims of the creditors under the assignment. As between the appellant and Willard, as a party defendant in the attachment suit, the evidence objected to

would clearly have been incompetent, on the ground suggested by appellant's counsel. But the evidence was not offered in that case, nor at the instance of Willard. The filing of the interpleader was, in effect, the commencement of a new suit by parties claiming adversely to both the plaintiff and defendants in the attachment suit, for the enforcement of rights which accrued, if they have any existence at all, long before the commencement of the attachment proceeding, and to hold that the rights of the creditors thus accruing could be prejudiced by anything Willard might do or neglect to do in the attachment suit, would certainly be a startling proposition, and one to which we can not for a moment yield our assent.

Upon a careful consideration of the instructions, we find no substantial error requiring a reversal. Some of those given on behalf of appellees are, considered as general propositions, subject to criticism, but as applicable to the evidence before the jury, and the controlling issue in the case, the appellant could not have been prejudiced by them. As to appellant's refused instructions, we think they either announced a wrong principle of law, or were calculated to mislead the jury, and were therefore properly refused. The truth is, the case was tried and decided by the jury upon a sharp issue of fact. Whether the attached property belonged to appellees, as charged in the interpleader, depended upon whether or not Willard & Patterson were partners in the grain trade. Appellant maintained that they were, and appellees that they were not. This was the frictional point in the case, and the one upon which it turned. The proofs in other respects were formal, merely. Upon this issue the jury found in favor of appellees, and their finding has received the sanction and approval of the circuit and Appellate courts, and, as already indicated, we discover no error in the proceedings of the trial court which we regard as having contributed to this result, and we are therefore not permitted to interpose.

The judgment will be affirmed.

Judgment affirmed.

Syllabus.

114 375
208 [5]606

114 375
209 [1]274

MARY STAHL

v.

CATHARINE STAHL *et al.*

Filed at Mt. Vernon June 13, 1885.

1. HOMESTEAD—*effect of a divorce at the suit of the wife, as to her homestead right.* Where a wife procures a divorce from her husband, the court is authorized to make disposition as to the homestead; but if the court fails to do this, the relation of husband and wife being severed by the decree of divorce, the latter loses all claim to a homestead, so that the husband may sell the premises without her release of homestead right. It is different in respect to the wife's dower, which is not lost by a divorce for the husband's fault.

2. The surviving wife of a deceased householder, who is made to succeed to his estate of homestead, is the one who is his wife at the time of his death. A divorced wife will take no rights in the homestead.

3. DOWER—*in the case of two widows, as, of father and son—and as to the relative rights of a wife who had obtained a divorce, and the wife in actual wedlock at the time of the husband's death.* Where a son takes land by descent from his father, subject to the dower of his mother in the same, and her dower is afterward assigned to her, such assignment will relate back to the time of the death of the father, so as to prevent the seizin of the son as of a present estate in the third of the premises assigned to the widow of the father; and the legal effect is to deprive the widow of the son, who dies in the lifetime of his mother, of dower even in the reversion of the third of the estate assigned.

4. But the rule is different where the father *conveys* to the son. In such case the son becomes seized of a present estate in the whole of the premises, subject only to the contingent dower right of his mother in one-third thereof, if she survives the grantor, so that upon the death of such grantee during the life of the widow of the grantor, the wife of such grantee is entitled to dower in the whole premises, subject only to the incumbrance of the prior right of dower in one-third of that estate during the actual continuance of that right.

5. So, applying these rules to the present case, where a husband, seized of the fee in land subject to the contingent right of dower in a former wife, who had procured a divorce for his fault, marries again, and dies leaving both the divorced wife and the second wife living, the former will take dower in one-third of the whole, unincumbered, and the latter will be entitled to dower in the whole premises, subject to the incumbrance of the first wife's prior right of dower during the continuance of that right.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. WILLIAM C. KUEFFNER, for the appellant:

Section 2, chapter 52, of the Revised Statutes, provides that "such (homestead) exemption shall continue after the death of such householder, for the benefit of the husband or wife surviving." The surviving wife takes the homestead. "A wife is a woman who has a husband." 2 Bouvier's Law Dic. 661.

When Christian Stahl, after the divorce, married Mary Meyers, (now Mary Stahl,) the latter became his wife, and remained so till his death. He could not, under our laws, have two wives at the same time. The divorce destroyed the marriage relation between him and Catharine Stahl, and they became strangers to each other as if they had never been married, except with regard to alimony and dower. The first wife thereafter had no rights in his property, except such as the decree for alimony gave her, and her dower rights expressly saved to her by the statute as the innocent party. Rev. Stat. chap. 41, sec. 14.

The law makes no similar saving as to the homestead. It provides: "In case of divorce, the court granting the divorce may dispose of the homestead according to the equities of the case." Rev. Stat. chap. 52, sec. 6.

The widow Mary Stahl was entitled to receive for dower one-third of all the land, and not only one-third of two-thirds. Rev. Stat. chap. 41, sec. 1.

If the land of the husband be subject to an incumbrance paramount to dower, the burthen is to be apportioned between the widow and the owner of the inheritance according to the relative value of their respective estates. 2 Scribner on Dower, (2d ed.) 696.

A widow is entitled to dower in lands of which her husband died seized, notwithstanding dower had been previously

assigned in the same lands to the widow of the husband's father. On the death of the widow of the father, the widow of the son becomes further entitled to one-third of the portion originally assigned to the former. *Beer* v. *Snyder*, 11 Wend. 592.

This question has, in effect, been passed upon by this court in the case of *Steele* v. *La Frambois' Admr.* 68 Ill. 457, where there was a junior and a senior dower right in the same land.

Mr. W. N. HORNER, for the appellees, after citing and commenting on sections 1 to 5, inclusive, of chapter 52, and section 16, of chapter 68, contended, from the evidence, that Catharine Stahl was clearly vested with the right of homestead. She has done no act to forfeit or lose it.

It is against the policy as well as the terms of the Homestead law, to permit the husband to deprive the wife of her right to claim the homestead,—except by removal with his family from the place. *Allen* v. *Hawley*, 66 Ill. 164. *Vide* section 16, chapter 68, of the Revised Statutes, *supra*, which is a recent enactment modifying the latter part of the above decision.

A husband can not effect an alienation of his family homestead by *laches*, and thus, by an indirect method, accomplish what he can not do directly. The right is conferred by statute, and can only be divested in the mode provided by statute. *Hubbell* v. *Canady*, 58 Ill. 425; *Booker* v. *Anderson*, 35 id. 66; *Haskins* v. *Litchfield*, 31 id. 137; *Pardee* v. *Lindley*, id. 174; *Mix* v. *King*, 66 id. 145.

Withdrawal from, by ill-treatment, does not deprive her of the right. Thompson on Homestead, secs. 73-78.

A husband can not deprive her of this right. *Conroy* v. *Sullivan*, 44 Ill. 451.

If a decree of divorce is silent as to homestead, the husband can not maintain ejectment against the divorced wife in possession. *Sellon* v. *Reed*, 5 Biss. 125.

Divorce by one for the misconduct of the other will not bar dower in the one who is blameless. Rev. Stat. chap. 41, sec. 14.

Where two or more widows are to be endowed out of the same messuage, as to the manner of setting out the same see 4 Kent's Com. (11th ed.) 67, *64; Coke on Littleton, 31; *In the matter of Creiger*, 1 Barb. Ch. 599; *Elwood* v. *Klock*, 13 Barb. 50; Washburn on Real Prop. (2d ed.) chap. 7, pp. 210, 211; *Learitt* v. *Lamprey*, 13 Pick. 382.

The interposition of a mere possibility, so that it be of a freehold nature, between the right of dower and the inheritance, will prevent a title of dower from attaching. 1 Scribner on Dower, (2d ed.) 246.

Dower is not allowed where there is an intervening contingent freehold remainder. 1 Scribner on Dower, (2d ed.) 235-246.

The inchoate right of dower is an incumbrance. It is a right of property. 2 Scribner on Dower, 3-8.

The wife's right to dower is an interest in lands contingent during the life of the husband, and attaches on the lands as soon as there is a concurrence of marriage and seizin. *Denton* v. *Nanny*, 8 Barb. 618.

Dower, before assignment, is "an interest in lands." *Finch* v. *Finch*, 10 Ohio St. 501; *Lathrop* v. *Foster*, 51 Me. 367.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Catharine Stahl was, on December 31, 1863, married to Christian Stahl, and lived with him as his wife on a certain eighty-acre tract of land, of which said Christian was seized in fee, until in the year 1882, when, in the month of February, she obtained a divorce from him for extreme and repeated cruelty, and a decree for alimony of fifteen dollars per month, which, by reason of his death, has abated. (*Lennahan* v. *O'Keefe*, 107 Ill. 620.) Philip Stahl, a minor, now about

seventeen years of age, was the sole issue of the marriage, who has, ever since the divorce, been in the sole custody of the said Catharine. The decree of divorce made no provision with respect to the custody of the child. After the divorce Christian Stahl continued to reside on said premises. On November 11, 1882, he was married to Mary Meyers, and lived with her as his wife, on the premises, until his death, on July 26, 1884, and ever since his death she has occupied the premises as his widow. There was no issue of this second marriage. Catharine Stahl, the first wife, and Philip Stahl, son of the first marriage, suing by Catharine Stahl, his next friend, filed their bill in chancery, claiming, on the part of said Catharine, dower and homestead in said real estate, alleging that Mary Stahl, the second wife, was entitled to dower in the land that should remain after the said Catharine's dower and homestead had been set off, and praying that the respective dower and homestead rights might be set off accordingly. Mary Stahl, the second wife, answered, denying that Catharine Stahl was entitled to homestead in the real estate, and filed her cross-bill, setting up the facts of the case, alleging that she was entitled to dower and to an estate of homestead in the premises, and praying that her dower and homestead might be set off to her. The circuit court decreed that Catharine Stahl was entitled to a homestead estate in said real estate of the value of $1000, and to a dower estate in what remained of said premises after said homestead estate had been set off, and that after said homestead and dower estates had been set off to said Catharine Stahl, then the said Mary Stahl was entitled to dower in the land then remaining. Mary Stahl took this appeal.

The circuit court erred in its decree as to homestead. Section 5, chapter 52, of the Revised Statutes of 1874, provides: "In case of a divorce, the court granting the divorce may dispose of the homestead estate according to the equities of the case." Here, the court granting the divorce made no order

with respect to the homestead. The disposition of it, therefore, must be as directed by the statute. After the divorce, the homestead estate remained and continued in Christian Stahl, the householder and owner in fee of the premises. Upon the granting of the divorce, Catharine Stahl's relation of wife to Christian Stahl was severed,—she then became entirely disconnected with the homestead estate, and had no right pertaining to any property of Christian Stahl by virtue of having been his wife, except dower saved by the statute, the divorce having been for the misconduct of the husband, and the alimony which was allowed. The Homestead Exemption act provides that no release or conveyance of the homestead estate shall be valid unless the same be in writing, subscribed by the householder and his or her wife or husband, if having one. Now, if, after the divorce and before his second marriage, Christian Stahl had been minded to release or convey the homestead, he could have done so by his own deed alone, as he would have had then no wife to join with him in the deed. Upon death, the statute declares, "such exemption (homestead) shall continue after the death of such householder, for the benefit of the husband or wife surviving, so long as he or she continues to occupy such homestead," etc. The wife surviving here was Mary Stahl, the second wife, and not Catharine Stahl, the divorced wife. The latter had once been the wife of Christian Stahl, but she was not his wife at the time of his death. Our law does not admit the idea of a man having two wives at the same time. The surviving wife of a decedent is the one who was his wife at the time of his death. Mary Stahl was such one here, occupying the premises at that time with Christian Stahl, and she is the person for whose benefit the statute says the homestead estate shall continue so long as she continues to occupy the homestead.

We are of opinion, too, the decree was erroneous in respect to the extent of the dower right of the second wife. There is

a case of dower where the rule which the court adopted would be the correct one,—as, where a son takes land by descent from his father, subject to the dower of his mother in the same, and her dower is afterwards assigned to her, such assignment relates back to the death of the father so as to prevent the seizin of the son as of a present estate in the third of the premises assigned to the widow of the father; and the legal effect is to deprive the widow of the son, who dies in the lifetime of his mother, of dower even in the reversion of the third of the estate assigned to the mother for dower. But the case is different where the father conveys to the son. In such case the son becomes seized of a present estate in the whole of the premises, subject only to the contingent dower right of his mother in one-third thereof if she survives the grantor,—so that upon the death of such grantee during the life of the widow of the grantor, the wife of such grantee is entitled to an estate in dower in the whole premises, subject only to the incumbrance of the prior right of dower in one-third of that estate during the actual continuance of that right. (*Dunham* v. *Osborn*, 1 Paige, 634; *In the matter of Cregier*, 1 Barb. Ch. 598; *Bear* v. *Snyder*, 11 Wend. 592.) The rule is laid down to the same effect in 4 Kent's Commentaries, marg. page 64, as follows: "If A be seized, and has a wife, and sells to B, who has a wife, and the husbands then die leaving their wives surviving, the wife of B will be dowable of one-third of two-thirds in the first instance, and of the one-third of the remaining one-third on the death of the widow of A, who, having the elder title in dower, is to be first satisfied of her dower out of the whole farm." And see 1 Washburn on Real. Prop. marg. page 210; *Steele* v. *La Frambois' Admr.* 68 Ill. 456.

This, we consider, is the rule which should apply here. Christian Stahl was seized of a present estate in the whole premises, subject only to the contingent right of dower of his first wife in one-third thereof; and the second wife is entitled

to dower in the whole premises, subject to the incumbrance of the first wife's prior right of dower during the continuance of that right.

The decree will be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Decree reversed.

114 382
126 651
114 382
142 507
114 382
186 1323

JANE R. STOWE

v.

HARRIET STEELE.

Filed at Ottawa June 13, 1885.

1. DOWER—*where deed becomes inoperative to pass principal estate—effect upon the release of dower.* Where a deed from a husband and wife becomes inoperative as to the husband's estate by reason of a sale under a prior judgment lien, or for other cause, it will also become inoperative as to a release of dower therein by the wife, and she may assert the right after the death of her husband.

2. SAME—*duty of dowress as to the payment of taxes—effect of non-payment as working a forfeiture, as for waste.* While the party holding the title to land in which a widow is entitled to dower, is in possession, or receiving the income from the estate, the dowress is under no obligation or duty to pay the taxes on the same.

3. So dower will not be forfeited by the failure of the dowress to pay the taxes on the premises, and allowing them to be sold therefor, before they are in fact assigned to her and she is put in possession.

4. If back taxes on land out of which dower is sought, are taken into consideration and adjudicated in the proceeding for the assignment of dower, in fixing the damages the damandant is entitled to for the detention of her dower, the reversioner, having had the benefit in that way of all the taxes paid by her, can not be heard to insist that the non-payment of such taxes at the proper time worked such waste as to bar her dower under the statute.

5. SAME—*laches—limitation—as a bar to dower right.* Where a widow has brought suit for the assignment of her dower in proper time, and has persistently been seeking such assignment for about twenty years, and has been delayed by appeals and the contesting of her right, she will not be barred of the same on the ground of *laches*.

6. No period short of seven years' adverse possession under claim and color of title and the payment of the taxes, will work a bar to the claim of dower; and the same strictness of proof as in actions of ejectment will be required to sustain the bar.

APPEAL from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

Messrs. MONROE & LEDDY, for the appellant:

Appellee was not entitled to dower in the premises in question, having previously relinquished the same in a deed to Hubbard. *Morton* v. *Noble*, 57 Ill. 176; *Dock Co.* v. *Kinzie*, 49 id. 289; *Johnson* v. *Montgomery*, 51 id. 185; Rev. Stat. chap. 30, sec. 17.

A tenant for life, or dowress, is liable for all taxes assessed upon lands subject to such tenancy. *Prettyman* v. *Walston*, 34 Ill. 175; *Peyton* v. *Jeffries*, 50 id. 143; *White* v. *Mayor of Nashville*, 2 Swan, 364; 2 Scribner on Dower, 733.

If appellee ever had a right of dower in the premises, she has forfeited the same by allowing the premises to be sold for taxes, and having been guilty of waste. Rev. Stat. chap. 4, sec. 45; *Finch* v. *Brown*, 3 Gilm. 488; *McConnell* v. *Greene*, id. 590; *Jones* v. *Devore*, 8 Ohio, 430.

Appellee's claim for dower is barred by the Statute of Limitations, and *laches*. *Owen* v. *Peacock*, 38 Ill. 33; *Steele* v. *Gellatly*, 41 id. 39; *Whiting* v. *Nicholl*, 46 id. 230.

A dowress does not acquire a right of entry until dower has been assigned her. Park on Dower, 334, 336; *Hoots* v. *Graham*, 23 Ill. 81.

Mr. JOHN W. WAUGHOP, for the appellee:

When the deed which is claimed to relinquish dower failed as to the husband, it also became inoperative as a release of dower. *Blaine* v. *Harrison*, 11 Ill. 385; *Summers* v. *Bobb*, 13 id. 483; *Stowe* v. *Steele*, 45 id. 330.

Appellee was not liable for taxes until put into possession. The only sale for taxes was before she ever had possession.

No period short of that fixed by the Statute of Limitations will bar dower. She is certainly not guilty of *laches*. The evidence in this case shows that the appellee has been constantly in court asserting her right to dower since 1864, when she filed her bill, up to the present time. *Stowe* v. *Steele*, 45 Ill. 328; 83 id. 422; *Steele* v. *LaFramboise*, 68 id. 436.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The original bill in this case was brought by Jane R. Stowe, in the Superior Court, against Harriet Steele, but as no point is made in the argument against the correctness of the decision of the court dismissing it for want of equity, its contents need not be stated. The present controversy arises on the decree rendered on the cross-bill of Harriet Steele, asserting her right to dower in the premises described in the original bill. The admission in the record forbids any controversy as to the original right of Mrs. Steele as to dower in the premises, and unless that right has been in some way barred or cut off, the decree assigning her dower, and consequent damages for the detention, must be affirmed.

It is said the right of dower which Mrs. Steele may have had in the premises, was released by the warranty deed of her husband, Ashbel Steele, conveying the premises to Elijah K. Hubbard, in the execution of which she joined and acknowledged the release of her dower. This deed bears date November 21, 1838. It is admitted by stipulation, that complainant in the original bill derived title to the premises by certain *mesne* conveyances, through a sheriff's sale, on a judgment recovered by W. H. Stowe and others, against Ashbel Steele, the husband of demandant, in July, 1837, and that the premises were conveyed to W. H. Stowe by the sheriff, in May, 1840. In that way the deed to Hubbard became inoperative by reason of the prior judgment lien. Complainant is in no way connected with the title conveyed by Ashbel Steele and

his wife to Hubbard. As to it she is a stranger, and can take nothing under it. All the title she has is by *mesne* conveyances from the purchaser at the sheriff's sale, on a judgment that had become a lien on the property prior to the making of the deed by the owner to Hubbard.

The doctrine is well settled by numerous decisions of this court, that where a deed from husband and wife becomes inoperative as to the husband's estate, because made in fraud of the rights of creditors, or from any previous lien or incumbrance, or where the purchase money is recovered back for a defect of title in the husband, the wife's dower is not barred by the deed. (*Blain* v. *Harrison*, 11 Ill. 384; *Morton* v. *Noble*, 57 id. 176, and other cases.) Here the deed of the husband and wife became inoperative as to the husband's estate by reason of a prior judgment lien, and under the rules announced in the cases cited, demandant's dower in the premises covered by the deed is not barred.

The statute (section 45 of the Dower act, Rev. Stat. 1874,) provides, no person endowed of any land shall commit or suffer any waste thereof, on penalty of forfeiting that part of the estate whereupon such waste is made,—and in view of that provision of law it is insisted if demandant were ever entitled to dower in the premises in question, she forfeited her right to the same by allowing the property to be sold for taxes. It is quite certain the dowress would be under no legal obligation to pay taxes until a portion of the estate had been assigned and set apart to her as and for dower, and it would seem to be a full and complete answer to the position taken, that no dower was in point of fact assigned to her at the time it was alleged the property was sold for taxes by or under any decree then in force. The first decree assigning dower to her in the property was rendered in 1864. That decree was reversed by the Supreme Court, and since then there has been no other decree assigning dower to her until it was done by the present decree. But aside from this view of the law, it

appears most of the taxes against the property the non-payment of which is said to be waste suffered by the dowress, accrued at a time when she was not in possession of the property, and at a time when the party entitled to the property after the dower should be extinguished was receiving the income from the estate, and of course the dowress would be under no sort of obligation to pay the taxes at that time. It does not appear how it was, in fact, but it may be the question of back taxes was adjudicated in fixing the amount of damages demandant would be entitled to for the detention of her dower. If so, the party entitled to the reversion having had the benefit in that way of all the taxes paid by her, she can not be heard to insist the non-payment of such taxes at the proper time worked such waste as would bar dower under the statute.

It is also made a point against the decree, that if demandant ever had a right of dower in the premises, the same is barred by the Statute of Limitations, and is lost by her extraordinary *laches* and neglect in enforcing the same. Neither position taken can be sustained. It has been repeatedly held by this court, that dower, as well as any other interest in land, may be barred by a state of facts that would bring the claim within the operation of the Statute of Limitations of 1839. (*Owen* v. *Peacock*, 38 Ill. 33; *Steele* v. *Gellaty*, 41 id. 39.) No period short of seven years' adverse possession under claim and color of title and the payment of taxes, will work a bar to the claim of dower, and the same strictness of proof as in actions of ejectment will be required to sustain the bar. It is obvious no period of seven years' adverse possession under claim and color of title, or otherwise, has been proved in this case, and no bar is made out under the Statute of Limitations of 1839.

Nor is there any just ground for imputing *laches* to demandant on account of failing to assert her claim to dower. The opinions of the Supreme Court in several cases between the

same parties, and other court proceedings, were put in evidence, from which it appears that "she has persistently asserted her claim to dower" in the premises, since May, 1864. In that year she filed her petition for dower. It was allowed by the court, and she was placed in possession of that portion of the premises assigned to her as dower. Although that decree was reversed by the Supreme Court, her dower in the premises was distinctly recognized, and the decree was only reversed for an error in ascertaining the damages for the detention of her dower. (*Stowe* v. *Steele*, 45 Ill. 328.) It is true she was afterwards, by the decree of the circuit court, dispossessed, but she was again, after being out of possession for a period less than six years, placed back in the possession of her dower by an order of the same court, and this latter order was afterwards affirmed in the Supreme Court. (*Stowe* v. *Steele*, 83 Ill. 422.) Since she was last placed in possession of the portion of the lot that had in a former proceeding been assigned to her as dower, demandant has continued in possession until the original bill in this case was filed, and a receiver was appointed by the court to take charge of the property. In view of these facts, it is idle to say demandant has been guilty of the slightest negligence in asserting her claim to dower to the premises in question. That it might have been done more effectually may be conceded, but certainly not more persistently. The records of this and other courts in evidence show she has constantly insisted on her claim, and now, after so many years of contention, she ought to be permitted the quiet enjoyment of that which this court decided, as early as 1867, was her legal right, without being subjected to further litigation concerning it.

The decree will be affirmed.

Decree affirmed.

Syllabus.

114 388
124 80
114 388
149 413
155 433
114 388
51a 144
114 388
167 118
114 388
172 278
114 388
174 601
114 388
179 250
83a 462
114 388
99a 18642
114 388
198 18378
114 388
211 18284
111a 18464
111a 18610

ROSWELL D. LYMAN

v.

HENRY E. GEDNEY.

Filed at Ottawa June 13, 1885.

1. SPECIFIC PERFORMANCE—*where penalty for non-performance is provided.* The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform, does not prevent a court of equity from decreeing a specific performance.

2. It is only where the contract stipulates for one of two things in the alternative,—the performance of certain acts, or the payment of a certain amount of money in lieu thereof,—that equity will not decree a specific performance of the first alternative.

3. DEDICATION—*by plat of a town.* A plat of a town laid out under the law of 1833 not having been acknowledged as required by that law, which shows a block marked "public square," was held not to have passed or conveyed any title to the public.

4. CANAL LANDS—*belonged to State.* The legal title to the canal lands granted by Congress to this State was not originally held by the canal trustees, but by the State itself, and such title was passed only by patents issued by the State and signed by the Governor.

5. SAME—*donations to and sales by counties.* Under the act of 1831 the canal commissioners were authorized to give lots in any county town laid out by them, not exceeding ten acres, to aid in the erection of public buildings, and the Governor was required to issue patents therefor; and in case of any such donation, the county commissioners of Cook and La Salle counties were authorized to sell such lots so donated to them, respectively, when they might think best, and apply the proceeds to the erection of a court house and jail in each county seat.

6. In this case the canal commissioners, in 1837, laid out and platted the town of Ottawa, in La Salle county, but the plat was not acknowledged, as required by the law then and since in force. Upon the plat, block 11 was divided into eight lots, and across the block were written the words, "public square." The State issued its patent to La Salle county for lots 1 to 8, inclusive, of block 11, after which the county commissioners sold and conveyed lots 1 and 2 of the block to private persons, which sales were, in 1841, ratified by the State legislature: *Held*, that the legal title, by these several acts, was vested in the grantee of the county, and the public had no longer any right or title to such lots.

7. CONSTITUTIONAL LAW—*power of legislature to sell public property.* In the absence of constitutional restriction the legislature may authorize pub-

lic property, or property held by the State, to be sold and conveyed to private individuals, where no trust in favor of private individuals stands in the way.

8. SAME—*when private rights prevent sale of public property.* Where a private individual conveys property to the public for a specified use, or where the public authorities plat and lay off grounds as dedicated to a public use, and sell other adjacent property on the faith of such public use remaining, and in consideration of its benefits to the property sold, it seems that such property so dedicated to the public can not afterwards be sold to private persons, to the detriment of those who purchased in consideration of the donation. But a person buying a lot around a public square after the sale of one or more lots therein, can not be heard to complain, nor can any one else, after the lapse of fifty years.

9. Although it may have been once doubtful as to the right of county commissioners to sell a portion of the lots in a block marked "public square," yet if such a sale is acquiesced in by the public authorities and private persons interested, for the period of fifty years, all persons will be estopped to question the validity of such sales as against the private rights of those claiming under the purchase.

10. CONVEYANCE—*as showing equitable outstanding title.* In 1851 the vendor of land made a conveyance of the same to an assignee of his three vendees, A, B and C, in which the making of the contract of sale to A, B and C, and its assignment to the grantee, were recited. It was objected, that as the assignment by one was by an attorney in fact, it was bad, because the power was not acknowledged, and because a wife of one of the vendees had an equity that did not pass by the assignment: *Held*, that as the legal title passed alone by the original vendor's deed, no acknowledgment to the power of attorney was necessary to the assignment of the contract, and as the property had been held for thirty years, the deed must be held as sufficient to pass the title.

11. SAME—*from a firm—presumption as to whether by all its members.* About forty years ago the owner of two lots conveyed them to a firm, (Cushman, Eaton & Co.) and the next deed in the chain of title was executed by W. H. Cushman and wife, Seth Eaton and wife, James M. Leonard and wife, and Benjamin Thompson and wife, to one N., but the deed did not recite that these persons constituted the firm named: *Held*, that such recital was not necessary; and it appearing Thompson was one of the firm, and no adverse claim ever having been interposed, it was also held that the proof was sufficient to show a conveyance from the firm, after the lapse of so great a time.

12. DOWER—*unreleased—no objection to title after dowress' death.* It was objected to a vendor's title to land, that the wives of two former owners failed to relinquish their dower; but it was *held*, that proof of their death prior to the sale obviated such objection; and so proof of the death of the husband of another dowress thirty years before, was held sufficient to show her dower was barred, and hence no incumbrance.

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13. MORTGAGE—*satisfaction by one of two mortgagees, good.* Where a mortgage is given by a debtor to two persons, to secure the payment of a sum of money to them jointly, either one of them, on payment to him, may enter satisfaction of the mortgage upon the record thereof, and if he is dead, proof of his signature and that of the attesting witness will be sufficient to show satisfaction.

14. SAME—*extinguishment—deed to mortgagee.* Where the mortgagor conveys the mortgaged premises to the mortgagee and another, and the mortgagee afterwards conveys to that other, this will extinguish the mortgage.

15. PAYMENT—*to one of two payees.* Payment to one of two joint payees extinguishes the debt.

16. JUDGMENT—*satisfaction by attorneys.* A father conveyed land to his daughter on March 29, 1878, and on June 6, 1878, a judgment was recovered against him and another, upon which an execution was issued, and returned "no property found." On June 9, 1879, the father compromised with the plaintiff in the judgment, and on that day the attorney of record for the plaintiff gave a receipt in full, and entered satisfaction upon the margin of the record. On June 29, 1879, the daughter reconveyed to her father, and the title passed from him to one who sold the land, and his title was objected to as being subject to the lien of the judgment: *Held*, that the purchaser could not refuse to complete the purchase on this ground, and that the judgment never was a lien on the land.

17. VARIANCE—*decree without amending bill.* A bill by a vendor of land for a specific performance of the contract, alleged that the complainant was seized in fee of the premises which he agreed to convey, subject to the payment of a mortgage indebtedness in the agreement mentioned, and the taxes, and that they were free of all other incumbrances. The agreement described the indebtedness as "a certain mortgage in favor of G. R. and A. K., given to secure the sum of $4000," etc., and the deed tendered described the mortgage in the same way. The evidence showed the existence of a mortgage to A. K., to secure $2500, due in four years, and $1500, due in three years. The decree found the mortgage debt correctly: *Held*, that the complainant technically should have amended his bill, averring the mistake in the description of the mortgage assumed; but as the correct amount of the incumbrance appeared both in the pleadings and proof, the error was not of such importance as to justify a reversal of the decree.

18. TENDER—*of deed, when rendered unnecessary.* Where the purchaser of land announces his intention to the vendor not to comply with his contract before bill filed against him for a specific performance, no tender of a deed to him will be necessary; and it will be no defence that before suit the vendor tendered him one which failed to describe the premises with sufficient accuracy.

19. DESCRIPTION *in deed—by reference to prior deed.* A contract for the sale of real estate, after attempting to describe a part of the lot, con-

Syllabus.

tained the following clause: "Also a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece of ground described in the deed to the party of the first part," which described the land properly: *Held*, that in so far as the contract referred to the deed to the vendor, and in effect adopted the description therein, no rectification of the contract was necessary.

20. SAME—*of land—evidence for purpose of rectifying a contract for mistake.* Where a mistake occurs in the description of land in a written contract of sale, a prior instrument written in pencil, evidencing the contract, is competent evidence to show the mistake in the more full and formal agreement afterwards entered into.

21. SAME—*controlling words.* An agreement in pencil, for the sale and exchange of real estate, described the land that one party was to convey to the other, as the "N. ½ of the N. ½ of lot No. 2, in block 11, * * * and a piece of ground 10 by 40 in rear thereof, on following terms, (namely, known as the Cook & Glover block:)" *Held*, that the words, "Cook & Glover block," were the controlling descriptive words, that the block was a fixed and permanent monument, and that any words repugnant to such description were to be rejected.

22. PAROL EVIDENCE—*to explain latent ambiguities, and identify premises conveyed.* There is no doubt but that latent ambiguities in the description of premises in deeds, etc., may be explained by parol evidence, and that such evidence may be resorted to for the purpose of identifying the premises and applying the calls of the deed, in suits for the rectification and specific performance, and in other proceedings affecting title.

23. SPECIFIC PERFORMANCE—*when party estopped from taking advantage of a want of strict performance.* Where the vendee of land, before the time fixed for the vendor to make him a conveyance, repudiates the contract, and refuses to accept the deed tendered to him, not on account of any objection to its form or substance, he will be estopped, in equity, from setting up in defence to a bill for specific performance, that time was of the essence of the contract, and a failure to tender a sufficient deed within the required time.

24. EVIDENCE—*of ability to assign insurance policies.* On bill for the specific performance of a contract for the sale and exchange of city property, where the complainant was to have certain policies of insurance on the buildings held by him assigned to the defendant, who repudiated the contract, the evidence showed that the insurance agent consented to the transfers: *Held*, that in the absence of proof to the contrary, it would be presumed the agent was willing to make the necessary indorsements of consent to their transfer.

APPEAL from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Messrs. SNOW & STEAD, and Mr. E. C. SWIFT, for the appellant:

A bill for specific performance is addressed to the discretion of the court, and may be denied, unless equity demands relief. *Rust* v. *Conrad*, 47 Mich. 454; *Seymour* v. *Delancy*, 6 Johns. Ch. 222; *Underwood* v. *Hithcox*, 1 Ves. Sr. 279; Adams' Eq. 83; Fry on Specific Per. 48; 2 Sedgwick on Damages, 422; *Frisby* v. *Ballance*, 4 Scam. 299; *Goss* v. *Jones*, 73 Ill. 508; *Race* v. *Weston*, 86 id. 95.

The agreement must not only be legal, but perfectly fair, and have been entered into without misrepresentation, misapprehension or oppression. *Frisby* v. *Ballance*, 4 Scam. 299; Kerr on Frauds and Mistake, 337; *Cadman* v. *Horner*, 18 Ves. 10.

The contract provides for the payment of $1000 as liquidated damages for non-performance, and the parties are bound by it. *Peine* v. *Weber*, 47 Ill. 47; *Gobble* v. *Linder*, 76 id. 159; *Reeves* v. *Stipp*, 91 id. 610; 2 Greenleaf on Evidence, sec. 259; Field on Damages, 154.

Appellee's title not being free from suspicion, appellant was not bound to take it. *Brown* v. *Cannon*, 5 Gilm. 174.

Block 11 having been dedicated for a public square, the county commissioners had no power to sell the lots therein to private persons. *Augusta* v. *Perkins*, 3 B. Mon. 437.

As to what constitutes a dedication to public use, and the evidence thereof, see *Godfrey* v. *City of Alton*, 12 Ill. 29; *Waugh* v. *Leach*, 28 id. 488; *Alvord* v. *Ashley*, 17 id. 363; *Rees* v. *Chicago*, 38 id. 322; *Field* v. *Carr*, 59 id. 200; *Stone* v. *Brooks*, 35 Cal. 489; *Noyes* v. *Ward*, 19 Conn. 268; *Smith* v. *State*, 3 Zabr. 712; *Aiken* v. *Lithgoe*, 7 Rich. 435; *Mayo* v. *Murchie*, 3 Munf. 358; *Cincinnati* v. *White*, 6 Pet. 431.

The block having been devoted to a public use, and held in trust for that use, no act of the legislature could authorize or ratify sales of lots in violation of the trust. *Franklin County* v. *Lathrop*, 9 Kan. 453; *Augusta* v. *Perkins*, 3 B. Mon. 437;

Alton v. *Transportation Co.* 12 Ill. 38; *Ransom* v. *Beal*, 29 Iowa, 69; *Still* v. *Lansingburgh*, 16 Barb. 107; *Warner* v. *City of Lyons*, 22 Iowa, 351; *Pomeroy* v. *Mills*, 3 Vt. 279; *Commonwealth* v. *Rush*, 2 Harr. 186; *Commonwealth* v. *McDonald*, 16 S. & R. 390; *Philadelphia* v. *Railroad Co.* 58 Pa. St. 253.

The title must be free from suspicion before the purchaser will be required to specifically perform. 1 Sugden on Vendors, 577; 3 Parsons on Contracts, 381; *Seymour* v. *Delancy*, 6 Johns. Ch. 233; *Richmond* v. *Gray*, 3 Allen, 25; *Tingley* v. *Cutler*, 7 Conn. 291; *Allen* v. *Atkinson*, 21 Mich. 351; Fry on Specific Per. secs. 573, 579, 580, 583.

Where the Statute of Frauds is pleaded, a written contract, no matter what may be the proof of fraud or mistake, can not be reformed on parol proof, so as to make it pass a larger interest in land than appears on its face. 2 Wharton on Evidence, secs. 905, 1024; Browne on Fraud, sec. 411; Fry on Specific Per. secs. 514, 520; Waterman on Specific Per. sec. 254, and note 1, p. 347; 5 Wait's Actions and Defences, 798; *Higginson* v. *Clowes*, 15 Ves. 506; *Glass* v. *Holbert*, 102 Mass. 24; *Elder* v. *Elder*, 10 Me. 80; *Climer* v. *Hovey*, 15 Mich. 8.

Time being of the essence of the contract, the failure to tender a proper deed in time is fatal to the relief sought. 3 Parsons on Contracts, *386; *Bodine* v. *Glading*, 21 Pa. St. 50; *Kemp* v. *Humphreys*, 13 Ill. 573.

Mr. C. B. CHAPMAN, and Messrs. MAYO & WIDMER, for the appellee:

A contract just and fair will be specifically enforced, notwithstanding the law gives a remedy by damages. *Rogers* v. *Saunders*, 16 Me. 92; *Hetfield* v. *Willey*, 105 Ill. 286; Story's Eq. Jur. sec. 751; Adams' Eq. *83; Bispham's Eq. sec. 371; *Chase* v. *Beal*, 20 Ga. 143; *Foss* v. *Haynes*, 31 Me. 81.

Possibility of dower in the land is not an incumbrance. *Bostwick* v. *Williams*, 36 Ill. 65; *Powell* v. *Monson Co.* 3 Mason, 355; *Mathison* v. *Wilson*, 87 Ill. 51.

The provision for the payment of $1000 for a breach of contract is no bar to relief by specific performance. *Broadwell* v. *Broadwell*, 1 Gilm. 599; 1 Sugden on Vendors, p. 334, sec. 57; 1 Story's Eq. Jur. sec. 715.

The evidence must be clear, either of an actual intent to dedicate, or of such acts or declarations as will equitably estop the owner from denying such intent. *Kelly* v. *Chicago*, 48 Ill. 388; *McIntyre* v. *Storey*, 80 id. 127; *Fisk* v. *Havana*, 88 id. 209.

After such lapse of time no court would dispossess the present owners. *Railroad Co.* v. *Joliet*, 79 Ill. 25; *Peoria* v. *Johnston*, 56 id. 51; Dillon on Mun. Corp. secs. 528, 529, note 1.

Payment of a mortgage debt to one of two joint payees discharges the debt, and extinguishes the mortgage. *Harding* v. *Parshall*, 56 Ill. 219; 1 Hilliard on Mortgages, 306.

No objection being made to the form of the deed tendered, it comes now too late. Readiness and willingness to perform was sufficient. *Mathison* v. *Wilson*, 87 Ill. 51.

After refusal to perform, no tender of any deed was necessary. *Boston* v. *Nichols*, 47 Ill. 353.

Any description adopted in a deed by which the premises intended to be conveyed may be established or identified, is sufficient. *Smith* v. *Crawford*, 81 Ill. 299.

As to reforming contract for mistake by parol evidence, and then decreeing a specific performance, see 3 Greenleaf on Evidence, p. 385, sec. 363; *Ballance* v. *Underhill*, 3 Scam. 453; *Willis* v. *Henderson*, 4 id. 13; *Broadwell* v. *Broadwell*, 1 Gilm. 579; *Insurance Co.* v. *Jones*, 87 Ill. 199; *McCormack* v. *Sage*, id. 485; *Hunter* v. *Bilyeu*, 30 id. 228; *McLennan* v. *Johnston*, 60 id. 356.

Time was not of the essence of the contract. *Corbus* v. *Teed*, 69 Ill. 205; Bispham's Eq. sec. 391; *Kercheval* v. *Snape*, 6 T. B. Mon. 362; *Magoffin* v. *Holt*, 1 Duv. 95; *Williston* v. *Williston*, 41 Barb. 635; *Kemp* v. *Humphreys*, 13 Ill. 573.

Opinion of the Court.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill for the rectification and specific performance of an agreement to exchange and convey certain real estate in the city of Ottawa. The court below decreed in conformity with the prayer of the bill, and the case is brought here by the appeal of the defendant.

After some preliminary discussion, which was protracted, the parties signed an agreement, written in pencil, as follows:

"H. E. Gedney agrees to convey to R. D. Lyman, by Sept. 1, the N. ½ of the N. ½ of lot No. 2, in block 11, by good and sufficient warranty deed, subject to mortgage of $4000, to Geo. R. and A. Keep, with interest accruing thereon from July 11, 1883, and a piece of ground 10 by 40 in rear thereof, on following terms, (namely, known as the Cook & Glover block): Lyman is to pay Gedney $8500, in cash or mortgages, by Sept. 1, 1883; also, to convey by good title the two lots of ground known as the Geo. H. Norris or Hickling property, being a two-story brick house, standing, etc., on lots 5 and 6, block 2, Walker's add. to Ottawa. Gedney is to have the use of all rents of property on the N. ½ of the N. ½ of lot 11, in block 11, till Nov. 1, 1883; also, to have use of Norris or Hickling property by Sept. 1, 1883. Gedney is to transfer to R. D. Lyman on Nov. 1, 1883, all his insurance policies on the three-story brick building conveyed to him, amounting to not less than $10,000, by renewing for one year any policies expiring before Nov. 1, 1883; and Lyman is to assign to Gedney his insurance policy amounting to ..... on the Norris or Hickling property. Gedney and Lyman bind themselves in the sum of 1000 dollars, as liquidated damages, to fulfill above agreement.

"Witness our hands this 24th day of Aug., 1883.

H. E. GEDNEY,
R. D. LYMAN."

At the time of signing this, the parties mutually agreed that Duncan McDougal, an attorney at law, should draw up a more formal instrument, written in ink, evidencing the agreement, which they would sign on the next day. Accordingly, he drew up the following, which was subsequently signed by the parties:

"This agreement, made this 24th day of August, A. D. 1883, by and between Henry E. Gedney, of the city of Ottawa, in the county of La Salle, and State of Illinois, party of the first part, and R. D. Lyman, of the same place, party of the second part:

"Witnesseth, that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey by good and sufficient warranty deed, subject to a certain mortgage in favor of George R. and A. Keep, given to secure the sum of $4000, together with interest accruing thereon from July 11, 1883, which the party of the second part assumes and agrees to pay, the lots, pieces or parcels of land situated in the county of La Salle, and State of Illinois, known and described as follows, to-wit: the north half of the north half of lot two (2), in block eleven (11), in the original town (now city) of Ottawa; also, a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece of ground described in the deed to the party of the first part. The party of the first part reserves the possession and accruing rents of said property until the 1st day of November, 1883, notwithstanding said conveyance may be sooner made without such reservations. The party of the first part further agrees to transfer to the party of the second part all insurance policies upon said property, to the amount of $10,000, at the time of the execution and delivery of said deed, and at his own expense renew, for the period of one year, any of said policies that may expire up to November 1,

1883. The party of the first part further agrees that his wife will join him in said conveyance, to the extent of relinquishing her dower right therein.

"The party of the second part covenants and agrees to pay the party of the first part the sum of $8500 in cash, or good notes and mortgages that are acceptable to the party of the first part, and convey to the party of the first part, by good and sufficient warranty deed, free and clear of all incumbrances, the following described lots, pieces or parcels of land situated in the county of La Salle, and State of Illinois, known and described as follows, to-wit: lots 5 and 6, in block 2, Walker's addition to the town (now city) of Ottawa, together with all and singular the appurtenances and privileges thereunto belonging or in anywise appertaining. The party of the second part agrees to assign and transfer, at the time of the delivery and execution of said deed, all the insurance policies then upon the property above described, known as the 'Norris or Hickling property.'

"It is mutually agreed by the parties hereto, that the several conveyances and payments above referred to shall be made on or before the first day of September next. The parties hereto further mutually bind themselves, respectively, in the penal sum of $1000, as liquidated damages, which they, respectively, agree to pay, each to the other, together with all other damages that may be sustained by either upon the failure of the other to comply with each and every one of the covenants herein contained.

"Witness our hands and seals the day and year first above written.

H. E. GEDNEY,
R. D. LYMAN."

Lyman refused to perform his part of this agreement. A mistake occurred in the description of the property to be conveyed by Gedney. The decree below corrects that mistake, and then requires this contract to be specifically performed.

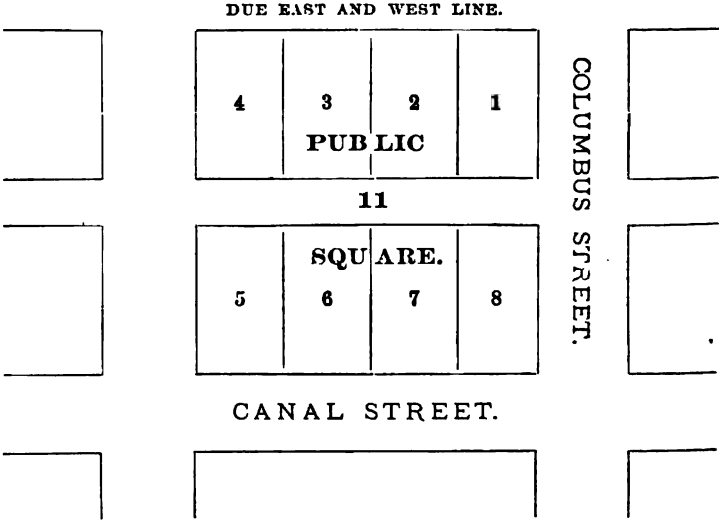
First—Counsel for appellant argue that the clause in the instrument written in pencil, whereby each party binds himself to the other in the sum of $1000, liquidated damages, limits the rights of the parties, upon a breach of the contract, in equity as well as at law, and that the only remedy is through an action at law for that sum; and they contend that the evidence shows that McDougal fraudulently added to that clause, as it is written in the last instrument, the words, "together with all other damages that may be sustained by either, upon the failure of the other to comply with each and every one of the covenants herein contained," and that he falsely represented to appellant that the legal effect of the clause was not changed by the addition of these words, and thereby induced appellant to sign the last instrument. The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform, does not prevent a court of equity from decreeing specific performance. (Fry on Specific Performance, sec. 67, *et seq;* Waterman on Specific Performance, sec. 22; Pomeroy on Contracts, sec. 50.) It is only where the contract stipulates for one of two things in the alternative,—the performance of certain acts, or the payment of a certain amount of money in lieu thereof,—that equity will not decree a specific performance of the first alternative. Pomeroy on Contracts, *ubi supra;* Waterman on Specific Performance, secs. 22, 23; *Dooley* v. *Watson*, 1 Gray, 414.

We can not hold that the evidence shows that McDougal misled appellant with regard to the legal effect of the clause under consideration, without disregarding the ordinary rules relating to the construing and weighing of evidence. Appellant's evidence, alone, might authorize that view, but it is directly contradicted by the evidence of McDougal and Summers, two intelligent and apparently disinterested witnesses. They both testify that appellant was fully informed of the legal effect of the last contract before he signed it, and that he was expressly told that he could not be relieved from lia-

bility upon it by the payment of the $1000, and that it could be specifically enforced. His own version of his conduct is not very satisfactory. He admits that he signed the instrument with full knowledge of the language, but claims that he was persuaded thereto by McDougal. If, as he says, he was not then intending to perform the contract, but was only intending to pay the $1000, why did he sign the last instrument at all? He does not pretend that McDougal represented to him that the last instrument would be less onerous upon him than the first, if he did not intend to perform. He says, it is true, that McDougal called his attention to the fact that in the last instrument appellee was obligated to procure his wife to join with him in conveying to appellant, and represented that this would be worth $2000—to him. But that could only be upon the hypothesis that he should perform his contract. If he only intended to pay $1000, and let appellee keep his property, it is impossible that he could have supposed that obligation could be of any advantage to him. Plainly, both on the face of the instrument and on the evidence *aliunde*, the case is not one wherein specific performance should be refused, because the parties intended, at the time, that it should be optional to pay the $1000 or to make the conveyances and payment provided by the terms of the contract.

Second—Counsel for appellant contend that the property which appellee agreed to convey is a part of a public square dedicated by the commissioners of the Illinois and Michigan Canal when they laid out the original town of Ottawa, and that therefore the county commissioners had no power to convey it. The property is a part of lots 1 and 2, in block 11, in the original town (now city) of Ottawa. The land on which Ottawa was laid off was donated to the State of Illinois by the act of Congress approved March 2, 1827, subject to the disposal of the legislature, to aid "in opening a canal to unite the waters of the Illinois river with those of Lake Mich-

igan," by which act power was given the State to sell and convey the whole or any part of the lands so donated, and to give titles in fee. It is provided by section 3 of "An act to create and organize the counties therein named," in force January 15, 1831, that the permanent county seat of LaSalle county is thereby established at Ottawa, "as the same has been surveyed and laid out by the canal commissioners, on the north side of the Illinois river." And by section 10 of the same act, that "the public buildings at Chicago shall be erected on the public square, as laid off by the canal commissioners, on the south side of the Chicago river; and on the public square laid off at Ottawa, on the north side of the Illinois river." Parol evidence was introduced to the effect that in 1831, block 11, in the original town of Ottawa, was popularly designated as the public square. A plat was given in evidence showing block 11 designated "public square," as follows:



And evidence was given of a certificate annexed to a plat of the town on which block 11 was thus designated, in these words:

"We, the undersigned, late commissioners of the Illinois and Michigan Canal, hereby certify that this map of the town of Ottawa is the identical map or plat by which we were governed in selling lots (belonging to the State) in the said town on the 26th day of September last past. The president of the board was absent at the time said lots were sold.

"Given under our hands, at Chicago, this 22d day of May, A. D. 1837.

W. B. ARCHER,
G. S. HUBBARD.

"Given under the hand and private seal of the secretary of the board of commissioners of the Illinois and Michigan Canal, no official seal being provided, at Chicago, this 29th day of May, A. D. 1837.

JOEL MANNING, *Sec'y.* [SEAL.] "

Counsel argue that these acts of the legislature, and this evidence of dedication, establish that block 11 was dedicated to public use as a public square.

The plat not having been acknowledged as provided by the statute of 1833, did not, of itself, convey title to the public as provided by that act. But, as we said in *Chicago* v. *Rumsey*, 87 Ill. 353: "The legal title was not held in the name of a trustee, but by the State; and the lots were conveyed by patent issuing from the chief executive officer of the State,—in all material respects similar to patents conveying lands from the general government." Moreover, it is provided by section 12 of the "Act to amend an act to provide for the construction of the Illinois and Michigan Canal," in force February 15, 1831, that "said commissioners" (*i. e.*, canal commissioners,) "are authorized, if they may be of opinion that it will increase the value of lots in any town laid off on the canal lands, that have or may become seats of justice, to give a quantity of lots in said town, not exceeding ten acres, to aid in the erection of public buildings, for which donation the Governor shall issue his patent as in other

cases." The Governor did, here, issue his patent pursuant to this section,—not conveying block 11 for a public square, but conveying "lots 1, 2, 3, 4, 5, 6, 7 and 8, in block 11," together with other described property, "in the town of Ottawa, La Salle county, Illinois, to aid in the erection of public buildings." That property which is conveyed to aid in the erection of public buildings is intended to be sold and converted into money, would seem to be self-evident; but the General Assembly, unwilling to leave this to implication, by the 11th section of the "Act to create and organize the counties therein named," in force January 15, 1831, *supra*, explicitly enacted: "If the canal commissioners shall make any donations of lots for the erection of public buildings, at Ottawa or Chicago, to the county commissioners of said counties, it shall be the duty of the county commissioners' courts of each of said counties to sell the same whenever they may think it best, and apply the proceeds thereof to the erection of a court house and jail at said county seats, respectively."

Instead, then, of there being a donation of this block for a public square, the lots into which it is divided are donated to be sold to raise money with which to build a court house and jail. True, it is commanded that the public buildings shall be on the square, as laid off, etc., and, we may admit, on this square; but it is not commanded the whole block shall be devoted to that purpose, and construing the different sections together, and giving practical effect to both provisions, the commissioners were required to use what they should deem necessary for the public buildings, and sell and convey the residue, in order to realize money to erect these buildings. If any trust was created, it is by virtue of the section referred to authorizing the canal commissioners to make donation of the property, and the patent of the Governor pursuant thereto vesting title in the county commissioners; but this, as is thus seen, was only to aid in the erection of the buildings. But if this were doubtful, in our opinion all doubt is removed

by "An act in relation to the public square in the original town of Ottawa," in force February 23, 1841, (Laws of 1841, p. 311,) by the first section whereof it is enacted: "That all sales heretofore made by the county commissioners of the county of La Salle, of lots or parts of lots in block No. 11, in the original town of Ottawa, in said county, be and the same are hereby ratified and confirmed, and declared to be good and valid in law and equity, any act heretofore passed, or any map or record declaring or describing said block as a public square, to the contrary notwithstanding."

Counsel, however, insist that this act is unconstitutional, because it is attempted by it to take property from the public and vest it in private individuals. We know of no reason why, in the absence of constitutional restriction, (and nothing of that kind can be here claimed,) the legislature may not authorize public property to be sold and conveyed to private individuals, when no trust in favor of private individuals stands in the way. But counsel contend, and introduce authorities to sustain the contention, that there is, in this case, a trust in favor of private individuals. The cases cited establish that there may be a trust, in such cases, in favor of private individuals,—first, where a private individual conveys property to the public for a specified public use; and second, where the public authorities plat or lay off grounds as dedicated to public use, and afterwards sell other property, presumably benefited by such public dedication, with the understanding and upon the faith that such public dedication has been made. In the first case the grantor retains such an interest in the property as enables him to enforce the trust, and in the second case the grantee has a vested right in having the presumptive advantage to his property, with reference to which he bought. We have seen there was no private grant here. The State owned the property, and donated it to the county commissioners. The intervention of the canal trustees did not give the donation a private character. They were but the

agents of the State, and the title passed by the patent of the Governor from the State to the county. The evidence in this record fails to show that other lots facing on the square were purchased before the lots in the east half of the block were sold, and hence it does not appear that there are any entitled to claim that their rights were acquired upon the faith of an implied undertaking that that part of the block should remain perpetually open as a public square. But even if there were any such parties, they could not now be heard after having remained so long silent, refusing or neglecting to assert their claims. This property was conveyed by the county commissioners to Broomfield, September 4, 1832,—fifty-one years before the present bill was filed. The intention, moreover, to dedicate the entire block to the public as and for a public square, instead of donating so much of it as should be deemed advisable to be sold to aid in building a court house and jail, being, at least, not established beyond controversy, after the acquiescence of those having authority to represent the public, for this great length of time, in the sale and conveyance by the county commissioners, they should now be estopped to question the validity of that sale and conveyance. The action of the commissioners, and this long acquiescence therein, and in the claims of those holding thereunder, should be taken as circumstances conclusively settling the controversy, whether the donation was for the one purpose or the other, in favor of the private rights of those claiming under the purchaser, and against the public. A kindred principle was applied in *Chicago, Rock Island and Pacific Railroad Co.* v. *City of Joliet*, 79 Ill. 25, and *City of Peoria* v. *Johnston*, 56 id. 51.

Third—It is objected by appellant that in the deed of Cushman and wife to Glover & Cook, dated March 3, 1851, there is a recital of a contract entered into between Henry Hurlbut, Smith, and Alonzo Delano, which is assigned by Henry Hurlbut, attorney in fact for Delano, and appellant introduced the power of attorney for the purpose of showing that

it was not acknowledged, and hence invested Hurlbut with no power; and he also objected, at the same time, that there is no conveyance by the wife of Alonzo Delano of her interest in the property under this assignment. But it is enough to say that this is but the recital of a contract which was assigned to Glover & Cook, and which forms the consideration for the execution of the deed. The contract was simply assigned to Glover & Cook by the attorney in fact, and Cushman's deed passed the legal title to them. No acknowledgment of the power was necessary. There is not a particle of proof that any rights have ever been claimed by Delano or his wife under that contract, and it surely can not require the citation of authorities to establish that no rights could now be enforced by Delano or his wife thereunder, after having acquiesced in the assignment for more than thirty years, and after notice, for the same length of time, that the property had been conveyed to these assignees, and by them to others.

Fourth—Broomfield (who was grantee of the county commissioners) and his wife conveyed to Cushman, Eaton & Co. It is objected that the next deed under which appellee claims is executed by W. H. Cushman and wife, Seth Eaton and wife, James M. Leonard and wife, and Benjamin Thompson and wife, to George H. Norris, and that it is nowhere recited that these persons constituted the firm of Cushman, Eaton & Co. There is no necessity, of which we are aware, that this should be recited in the record. There is affirmative proof that Benjamin Thompson was a member of the firm of Cushman, Eaton & Co., and from the similarity of the names in both deeds, and the fact that these persons assume to have an interest to convey in the property, and that there is no proof that any one else has ever claimed adversely to this deed to Norris, as a member of that firm, we think the proof that the conveyance is by Cushman, Eaton & Co. to Norris, should be accepted as sufficient. Apart from this, the proof of an actual, exclusive possession by Norris, and

those claiming under him, for a period of some forty years, is shown, which, of itself, is conclusive against any who might claim adversely under Cushman, Eaton & Co.

Fifth—The objection that Mrs. Thompson, Mrs. Sizer and Mrs. Alson Woodruff did not relinquish their dower, is answered by proof of their respective deaths many years since. And a like objection in regard to Mrs. Robert P. Woodruff is answered by proof of the death of Robert P. Woodruff in 1844, leaving intervening a much greater period of time than is necessary, under the statute, to bar any suit on her behalf for dower.

Sixth—The objection that the power of attorney whereby William Hickling was empowered to cancel mortgages, in the joint name of Walker and Hickling, did not empower him to cancel mortgages to George E. Walker and William Hickling, we incline to think is too technical; but waiving that, and conceding its insufficiency, the release on the margin of the record of the only mortgage affected by the objection, acknowledged the full payment of the mortgage, and was signed and sealed by William Hickling, one of the mortgagees, whose signature, as well as that of the attesting witness, was proven. The rule is, payment to one of two joint payees extinguishes the debt, (*Harding* v. *Parshall*, 56 Ill. 219,) and, of course, payment of the debt discharged the mortgage.

Seventh—Objection is urged that a mortgage made by Broomfield to Sizer, March 2, 1842, is not shown to have been satisfied; but it is proved that Broomfield, after executing the mortgage, conveyed the fee to Sizer, the mortgagee, and W. H. Cushman, and that Sizer subsequently conveyed to Cushman. That extinguished the mortgage. *Weiner* v. *Heintz*, 17 Ill. 262; *Shinn* v. *Fredericks et al.* 56 id. 439.

Eighth—It was in proof that appellee conveyed to Louie H. Dale, his daughter, on March 29, 1878; that she reconveyed to appellee on the 29th of June, 1879, and that a judgment was recovered against appellee, in favor of Selah Wait,

executor, etc., on the 6th of June, 1878, for $2491.63. Execution was issued on this judgment November 12, 1878, and returned January 4, 1879, "no property found on which to levy." On the 9th of June, 1879, appellee effected a compromise with the plaintiff in the judgment, and on that day the attorneys of record for the plaintiff gave him a receipt for $520, in full, etc., and indorsed on the margin of the record of the judgment, "Above judgment and interest paid in full, according to the terms and instructions of the plaintiff," which they signed. It will be observed this judgment has never been a lien, legally speaking, whatever might have been the equitable rights of the parties, upon the property here in controversy. The judgment was obtained after appellee had ceased to be the legal owner of the property, and it was satisfied of record before he was reinvested with the legal title. There is no evidence that any party interested in that judgment is or has been dissatisfied with the compromise and satisfaction of it, and although more than four years had elapsed after the entry of satisfaction before the making of the agreement of which specific performance was decreed in the present suit, no steps were taken to set aside the satisfaction. Under the evidence before the court, we think it quite clear that appellant can not be disturbed on account of that judgment, and that he can not be heard to urge anything in regard to it as an excuse for his failure to comply with his agreement.

Ninth—It is alleged in the bill, that at the time of making the agreement the complainant was seized in fee of the premises which he agreed to convey, subject to the payment of a mortgage indebtedness in said agreement mentioned, and to the taxes for the year 1883, and that the same are free of all other incumbrances. The mortgage indebtedness in the agreement mentioned is "a certain mortgage in favor of George R. and A. Keep, given to secure the sum of $4000," etc. The deed tendered describes the mortgage in the same

way. The evidence showed the existence of a mortgage to Augustus Keep to secure $2500, due in four years, and $1500, due in three years. It is contended the decree is not authorized—that the evidence does not sustain the allegations in the bill, in this respect. The decree finds "that the mortgage described in said agreement as a certain mortgage in favor of George R. and A. Keep, given to secure the sum of $4000, etc., payment of which was to be assumed by defendant herein, was a mortgage given by the complainant and wife to Augustus Keep, etc., to secure the payment of $2500, in four years, and $1500, in three years. Strictly and technically, appellee should have amended his bill, averring the mistake in the description of the mortgage assumed; but we can not say that it was such error to decree, as was decreed, without such amendment as would justify the reversal of the decree below. The substantial thing was the amount of the incumbrance which appellant assumed. Whether it was in one or more notes, or payable to one party or two parties, was mere matter of form, that could not substantially affect appellant. The amount was correctly stated in the agreement. It is proven there is no other mortgage on the property. The burden assumed, and the only burden which is chargeable against the property, is that described in the agreement,—a burden of $4000,—with interest thereon from July 11, 1883.

Tenth—The objection the deed tendered did not describe the property which it purported to convey, with sufficient accuracy, we regard untenable. Appellant having announced his intention to not comply with the contract before the bill was filed, no tender was necessary. (*Boston* v. *Nichols*, 47 Ill. 353.) Under the decree, appellee must execute a deed conveying the property, as provided by the terms of the contract, and the execution of the decree will be under the supervision of the court.

Eleventh—The point is made that, the Statute of Frauds being pleaded, it is not competent to decree a rectification

and specific performance of the contract, on parol evidence. The mistake in the description of the property in the written instrument occurred in this way: Lot 2, in block 11, is one hundred and fifty feet long, north and south, by eighty feet wide, east and west. The Cook & Glover block, which appellee undertakes to convey to appellant, occupies the north forty feet of the lot, which appellee by mistake assumed was one-half of one-half, or one-fourth of it, and hence, in the instrument, the block was, by mistake, described as the north half of the north half of the lot,—which, of course, is but thirty-seven and one-half feet, and leaves two and one-half feet occupied by the block, unconveyed. The balance of the description, in the instrument written in ink, is, after the words, "north half of the north half of lot 2," etc., "also a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece of ground described in the deed to the party of the first part." The deed to the party of the first part is by Cook & Glover, and conveys "a strip of land ten (10) feet in width, east and west, and forty (40) in length, north and south, in the north-west corner of lot number one (1), in block number eleven (11), in the original town (now city) of Ottawa, Illinois,—the premises above described being situated immediately in the rear of said Henry Gedney's block of brick stores on lot numbered 2, in said block numbered 11, situated in the county of La Salle, in the State of Illinois." This description is free of objection, and inasmuch as the instrument refers to it, and, in effect, adopts it, no rectification of that much of the instrument is needed. *Smith* v. *Crawford*, 81 Ill. 299.

For the purpose of rectification, the instrument written in pencil is competent evidence. It describes the property which appellant undertakes to convey, thus: "N. ½ of the N. ½ of lot No. 2, in block 11, * * * and a piece of ground 10 by 40 in rear thereof, on the following terms, (namely, known as the Cook & Glover block.)" In effect, the Cook & Glover

block is conveyed, and a strip of ground ten by forty in the rear thereof. The words, "Cook & Glover block," are the controlling descriptive words. The block is a fixed and permanent monument, and under the well settled rules of construction applicable to conveyances, any words of description repugnant thereto, or inconsistent therewith, must be rejected. Without affirming or denying what may be the law in a case where rectification and specific performance rest entirely on parol evidence, there can be no question but that latent ambiguities may be explained by parol evidence, and that such evidence may also be resorted to for the purpose of identifying the premises and applying the calls of the deed, in suits for rectification and specific performance, and in other actions and proceedings affecting title. (*Cossit* v. *Hobbs*, 56 Ill. 231; *McLennan* v. *Johnston*, 60 id. 306.) By applying parol evidence to this description, it is proved that the north half of the north half of lot 2 is only thirty-seven and one-half feet, and that Cook & Glover's block occupies the north forty feet of the lot, and so, then, we must reject the description "north half of the north half" as repugnant to the other description or call in the deed, namely, "Cook & Glover's block," and, following that, hold that the contract is to convey the north forty feet of the lot.

Twelfth—To the objection that time was of the essence of the contract, and appellee did not tender a sufficient deed within the time, it is enough to say, appellant, by previously refusing to comply with the contract, is estopped from urging that objection. A deed was tendered within the time, which he would not receive or examine, and this, not because of any imperfection in the frame of the instrument, but because he had previously determined not to comply with the contract. The law did not require appellee to go through with a form which appellant had previously apprised him would be idle and useless.

Thirteenth—The objection that appellee misrepresented the condition of the property he was to convey, in respect to the water supply, is not sustained by the evidence. The evidence of appellant is squarely met and contradicted, in that respect, by the evidence of appellee and McDougal.

Fourteenth—The objection that the policies of insurance could not be assigned without the consent of the company indorsed thereon, and that such indorsement was not obtained, is, under the evidence, without merit. The insurance agent, the evidence shows, consented to the transfers, and we must assume, in the absence of evidence to the contrary, was willing to make the necessary indorsement. The objection, like several others, seems purely captious.

In conclusion, we can see no ground upon which we can assert that the court below erred, with such confidence as to warrant us in reversing the decree below. In view of the fact that by possession alone appellee's title to his property is unassailable, and clearly so, we do not think appellant was justified in acting on rumors current forty or fifty years before, that the interest of the public in the property had not been legally divested; and it is worthy of note that in respect of the many objections of incumbrances on the property, not a single instance is shown where one is threatened to be enforced. They are hunted up and magnified by the appellant as after-discovered excuses for a previous refusal to perform his contracts. In one or two aspects the case is a very close one,—so close that we are inclined to think we would not have reversed a decree either way. To some extent the chancellor had a discretion. We can not say that discretion has been abused.

The decree is affirmed.

Decree affirmed.

Syllabus.

THE DRUMMOND TOBACCO COMPANY

v.

CHARLES H. RANDLE *et al.*

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196 *267

Filed at Mt. Vernon September 25, 1885.

1. CORPORATION—*two corporations using the same or similar names in the same business—right of prior organization to prevent the same.* A bill by a domestic corporation incorporated by the name of "Drummond Tobacco Company," to enjoin the incorporation of another company in the same city by the name of "Drummond-Randle Tobacco Company," to engage in the same business, will not be sustained unless it is shown, by such a preponderance of evidence as to satisfy the mind of the chancellor, that the incorporation of the second company under the name proposed will injure the former company in its business.

2. So the use of any particular name by a corporation will not be enjoined unless it is made to appear, from the evidence and by all the circumstances, the proposed use of the name will likely result in injury to the complainant.

3. If the persons composing a corporation formed under the laws of this State should become also incorporated under the laws of another State, the two organizations will constitute separate and distinct corporate bodies, and the one can not form an integral part of the other; and the corporation of this State can not enjoin the formation of a new corporation in this State under a similar name, to prevent an injury to the business of buying and selling of the foreign corporation in this State.

4. If a domestic corporation, after its members have procured an incorporation of themselves in a sister State, by the same name, should abandon the business, practically, in this State, and keep its organization only in name, to prevent others from transacting the same business, it can not, in equity, maintain a bill to enjoin the formation of another corporation in this State by a similar name, to engage in the same business, when none of its trade-marks are sought or intended to be used by the latter.

5. AMENDMENT—*of the record during term.* The circuit court has the power, at any time during the term, to allow an amendment of its record, so that it may conform to the facts. In this case the record was amended so as to show that suggestions of damages were filed upon the dissolution of an injunction, before the question had passed from the control of the court, and it was *held*, that the court during the term had power to allow the amendment.

6. APPEAL—*whether a franchise is involved.* Where a bill seeks to enjoin the incorporation of a company by a given name, adopted in the preparatory steps and proceedings, an appeal lies directly from a decree of the circuit court dismissing the bill, to this court, as a franchise is involved.

Statement of the case.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This is a bill in equity, by the Drummond Tobacco Company, against Charles H. Randle, John N. Drummond, John E. Hayner, George B. O'Kell, and John J. Mitchell. After the caption and address the bill proceeds as follows:

"That in the month of June, A. D. 1876, your orator became lawfully incorporated as a body corporate, under the general laws of the State of Illinois, by and under the name of 'Dausman & Drummond Tobacco Company,' with its chief office and place of business, under its articles, at the city of Alton, in said State. Your orator further avers that it commenced and carried on the business contemplated by its certificate of incorporation,—that is, the manufacture and sale of plug chewing tobacco at Alton, aforesaid,—and continued to so carry on and conduct said business under the name of Dausman & Drummond Tobacco Company, until the 20th day of August, 1879. Your orator further avers that on, to-wit, said 20th day of August, 1879, your orator's name was lawfully changed, under the general laws of Illinois, to the name of 'Drummond Tobacco Company,' by which name your orator has ever since been known and called; and ever since said date last aforesaid your orator has continued to conduct its lawful business of manufacturing and selling plug chewing tobacco at Alton, aforesaid, under its said corporate name of Drummond Tobacco Company, and still continues to so conduct and carry on its said business at the place last aforesaid. Your orator further avers that it has fully and in every respect complied with the laws of Illinois, and is now a lawful corporation of said State, having its principal office and place of business at the city of Alton, aforesaid. Your orator further avers, that your orator, by the expenditure of much time and labor and large sums of money, has widely circulated in its trade and business its said corporate name of Drummond

Tobacco Company, and has, by the use of your orator's said corporate name, printed and impressed upon labels, tags, and by other devices and designs, made known, generally, and distinguished and designated tobaccos of your orator's manufacture, so that 'Drummond tobacco,' and 'Drummond's goods,' and 'Drummond's brands,' have come into general use, and become well and favorably known throughout the United States, and thereby rendered the property in your orator's said corporate name, and the good will and trade-mark thereof, of great and permanent value to your orator; and your orator has acquired a proprietary right in and to its said corporate name, so that respondents neither lawfully have, nor can the proposed corporation hereafter mentioned have, a right to use your orator's said corporate name, nor any similitude thereof. Your orator further avers that under its said corporate name, and by virtue of the property in and good will thereof, your orator has established a very large and lucrative business in this and other States. Your orator further avers that said respondents, John N. Drummond, Charles H. Randle and John E. Hayner, were lately stockholders in your orator, from and after August 20, 1879, and the said Randle and Drummond were officers of your orator, the said Drummond having been the president, and the said Randle, the secretary, of your orator, whereby they acquired a knowledge of the business of your orator, and a knowledge of the names of your orator's customers, their places of residence and their commercial standing and credit, and otherwise had and obtained knowledge of your orator's business and affairs which otherwise they would not have obtained. Your orator further avers that said Randle, Drummond and Hayner, together with the other respondents, and in concert with them, concerted and conceived a scheme to form another and rival corporation, and to that end, and in view thereof, sold their stock in your orator, and resigned their respective trusts as officers of your orator, and immediately thereafter

commenced the consummation of their said scheme to form and incorporate such rival corporation, and that said proposed corporation shall also have its chief office and place of business, under its articles, at the same place at which your orator is, by its articles, located and domiciled. And your orator avers that it is the intention of the said defendants, if successful in organizing such corporation under the name of 'Drummond-Randle Tobacco Company,' to carry on the same business as that of your orator, and in the same markets. Your orator further avers that your orator is informed and believes, and charges the fact to be, that in order to carry out said scheme said respondents have made the statement required by law, and have filed the same in the office of the Secretary of State of Illinois, setting forth that the name of the proposed rival corporation shall be 'Drummond-Randle Tobacco Company,' and that it is to be created and organized a corporation for the purpose of manufacturing plug chewing tobacco, at Alton, aforesaid. Your orator further avers that said Secretary of State has already issued a license to said respondents, as commissioners, to open books for subscription to the capital stock of said proposed corporation, by and under the provisions of sections 2 and 3, of chapter 32, of the Revised Statutes of Illinois, which books are to be opened and subscriptions made under the proposed corporate name of 'Drummond-Randle Tobacco Company,' but that said commissioners have not, as yet, made or filed their report of their proceedings and doings under said license, but are actively preparing so to do; nor has said Secretary of State yet issued his certificate of the complete organization of said proposed corporation, nor has said proposed corporation become yet fully organized, but your orator has been informed and believes, and charges the fact to be, that said commissioners are actively engaged in preparing their report and preparing their other duties provided by the statute, and give out that they will file in the office of said Secretary of State their

doings as said commissioners at once, and that they and the other respondents, as soon as said report shall be filed, intend to demand of said Secretary of State that he issue to them and their successors a certificate of the complete organization of said proposed corporation, by and under the said corporate name of Drummond-Randle Tobacco Company, and that your orator is informed and believes, and charges the fact to be, that said respondents will carry into effect their said scheme and purpose to cause the complete organization of the said proposed corporation under said last named corporate name, and will do so immediately unless restrained from so doing by the order of this honorable court. Your orator further avers that should said respondents succeed in effecting their purpose to organize the said proposed corporation by the name of 'Drummond-Randle Tobacco Company,' and commence the manufacture and sale of plug chewing tobacco by and under said proposed corporate name, (as said respondents threaten and give out that they intend to do,) the public at large will be deceived as to the true source and origin of goods of their manufacture, and mistake such tobaccos so manufactured by said proposed corporation, as the goods manufactured and sold by your orator, as aforesaid; and the said proposed corporate name of Drummond-Randle Tobacco Company is so similar to that of your orator, that the proposed corporation will be mistaken for and confounded with your orator, and that if the purpose to form said proposed corporation shall be effected by said respondents, confusion and uncertainty concerning the corporate name of your orator will occur, whereby the identity of your orator's goods and business will be injuriously affected, and by confusing your orator's identity, goods and business with that of said proposed corporation, the business and good will and property of your orator's corporate name will be greatly injured, and your orator suffer irreparable loss and damages. Your orator further avers that confusion in the correspondence of your orator and said pro-

posed corporation has already arisen, your orator having received letters addressed to and intended for said proposed corporation, and your orator states that correspondence may have been delivered to said respondents, by their proposed corporate name, addressed to and intended for your orator, and your orator avers that great confusion will hereafter ensue in the correspondence of your orator and said proposed corporation if it is permitted to be organized under its said proposed corporate name. Your orator further avers that if said proposed corporation shall be fully organized and do the business contemplated by it, as aforesaid, under the said proposed corporate name, dealers in the market will be confused, and led into the false belief that the two corporations are the same, and that great injury will result to the public and your orator, and the property in your orator's said corporate name, and especially the use of the word 'Drummond,' as connected with and as a part of its said corporate name, will thereby be infringed upon, and the good will and trademark thereof and property therein will be supplanted and destroyed, and the valuable business and trade which your orator has established by the expenditure of large sums of money and at a great cost of labor, under its said corporate name, and especially the use of the word 'Drummond' as a part of its said corporate name, and the good will and trademark thereof, attached to the goods of your orator, as aforesaid, will be wholly lost or greatly impaired. Your orator further avers that it has no adequate remedy at law in the premises, and that unless relief is here granted, your orator will be irreparably injured."

The prayer of the bill is, that defendants answer, their oaths thereto being waived, and "that a preliminary injunction may issue, restraining said respondents, their agents, servants and employes, from further proceeding with the organization of said proposed corporation under the said name of 'Drummond-Randle Tobacco Company,' and that they be further

restrained from filing or causing to be filed with said Secretary of State said commissioners' report of the doings of said commissioners under said license to form a corporation under the corporate name aforesaid, and further restrained from applying to said Secretary of State for a final certificate of complete organization of said proposed corporation under the corporate name of 'Drummond-Randle Tobacco Company,' and that on a final hearing, said injunction be made perpetual," and concludes with a prayer for general relief. A temporary injunction was granted, and afterwards, on the 16th of March, 1885, the defendants answered (omitting the introduction) as follows:

"*First*—That they admit that in the month of June, 1876, there was a corporation formed and organized under the laws of the State of Illinois, under and by the name of 'Dausman & Drummond Tobacco Company,' with its office and place of business at the city of Alton, in the State of Illinois.

"*Third*—And these defendants further answering, admit that the name of the said corporation was, on the 20th day of August, 1879, lawfully changed to the name of 'Drummond Tobacco Company,' by which name the said complainant has ever since been known and called, and has continued to carry on its business of manufacturing and selling plug chewing tobacco, under the corporate name of 'Drummond Tobacco Company,' at Alton, aforesaid, except as hereinafter stated.

"*Fourth*—And these defendants further answering, say that they admit that the said complainant has fully complied with the laws of the State of Illinois, and they do not deny but that the said corporation is a lawful corporation of the State of Illinois, but they do expressly deny that its principal office and place of business is at the city of Alton, aforesaid, except as hereinafter stated; and these defendants will hereafter set forth and state the actual facts of the case upon the point of the location of the principal office and place of business of the said complainant.

"*Fifth*—And these defendants further answering, admit that the complainant, by the expenditure of much time, labor and large sums of money, has widely circulated in its trade its said corporate name of 'Drummond Tobacco Company,' and that by the use of its corporate name printed and impressed upon labels, and other devices and designs, made known and generally distinguished and designated the tobacco manufactured by the complainant, and they can not deny but that 'Drummond tobacco,' and 'Drummond goods,' and 'Drummond brands,' may have, to some extent, come into use, and become well and favorably known, and thereby become the property of the complainant; but these defendants deny that the credit or market value of the goods manufactured by the complainant are to any considerable extent enhanced by the use of the name of the said complainant, but on the contrary, these defendants aver that the credit and value of said goods manufactured and sold by the said complainant are affected and controlled by other matters which will hereafter be stated.

"*Sixth*—And these defendants further answering, say they admit that the said complainant has, acting under its corporate name, established a large and valuable business in this and other States.

"*Seventh*—And these defendants further answering, admit that these defendants, John N. Drummond, Charles H. Randle and John E. Hayner, were lately stockholders in the complainant corporation, and that these defendants, Drummond and Randle, were the president and secretary thereof; and they further admit that while such president and secretary, they acquired some knowledge of the business of the complainant, and of the names and places of residence and commercial standing and credit of its customers, and otherwise obtained some knowledge of the complainant's business and affairs which they would not otherwise have obtained; but these defendants aver and expressly charge that the com-

plainant had not any peculiar business secrets, or processes of manufacture, or methods of trade or business, within the knowledge of these defendants, and they deny that the said complainant has any right to complain that these defendants propose to use their experience in business and knowledge acquired by them, in the promotion of their own affairs and business.

"*Eighth*—And these defendants further answering, say that it is true, as charged in said complainant's bill, that they intend to form a corporation to engage in the manufacture and sale of plug chewing tobacco, with its principal office and place of business in the city of Alton; that it is true the said defendants, John N. Drummond, Charles H. Randle and John E. Hayner, were stockholders in the complainant, and that by the sale of their stock the said John N. Drummond and Charles H. Randle vacated their offices of president and secretary, but they charge the truth to be that they sold their said stock to, and with the express assent of, James T. Drummond, the principal stockholder in the complainant company, and with the consent of said company, as far as they know and believe; and they have never, either in the sale of their said stock or otherwise, either expressly or impliedly promised or agreed with the said stockholders in the said complainant corporation, or otherwise, that they would not organize a corporation or otherwise carry on the business of manufacturing plug chewing tobacco; and they expressly charge and insist that the said corporation which they propose and intend to organize, is in no sense the rival of the complainant, except that it proposes and intends to carry on the business of manufacturing plug chewing tobacco; and they expressly deny that they intend to organize a corporation of or with the name of the complainant; they expressly deny that they intend or have threatened to use the name of the complainant, or any sign, mark or device used by the said complainant in its business; on the contrary, they expressly charge that they

propose and intend, in the prosecution of the business of the corporation which they expect to organize, to use such marks, brands and trade-marks upon the goods, bill and note-heads, as will distinguish their products and manufactures, and their correspondence, not only from the products, manufactures and correspondence of the complainant, but from the products, manufactures and correspondence of all other companies and persons. And these defendants expressly deny all concert, false intent or desire to interfere with, or appropriate to themselves or the corporation, the business or affairs of the complainant, otherwise than as they may lawfully do by fair competition in the markets. They deny that they were influenced, in the selection of the name of their said corporation, by any purpose or intent to interfere with the business of the complainant, or to produce confusion in its business or correspondence, but in the selection of the name for their proposed corporation they were influenced alone by the fact that it was expected by these defendants that their associates, John N. Drummond and Charles H. Randle, were large stockholders, or would be so, in the proposed corporation, and active managers of its business, and that the name was, or would be, otherwise suitable and appropriate, and could not be mistaken for the name of any other company or corporation.

"*Ninth*—And these defendants further answering, say that they admit that they have taken the preliminary steps to the organization of a corporation, under the laws of the State of Illinois, by the name of 'Drummond-Randle Tobacco Company,' to carry on the business of the manufacture and sale of plug chewing tobacco in all accessible and profitable markets, and that its principal office and place of business will be at the city of Alton, in the State of Illinois; and that before this time they believe their organization would have been completed if it had not been prevented by the injunction issued herein.

"*Tenth*—These defendants further answering, deny that the name they propose for their said corporation is so similar or like that of the complainant as to produce or occasion any doubt or confusion in the trade or with the customers of either. They deny that the name, 'Drummond-Randle Tobacco Company,' can be mistaken for that of 'Drummond Tobacco Company,' by the trade or by any person interested in either, or who may have business with either of said companies, or who will deal or trade with either, or in the products of either company, or that the goods manufactured by either corporation will be confounded with or mistaken in the trade, or by dealers or customers, for the goods manufactured by the other.

"*Eleventh*—And these defendants further answering, say that in addition to the sufficient difference in the name of the complainant and the corporation they propose to organize, they expressly charge the truth to be, that in the tobacco trade the name of the manufacturers of plug tobacco is of small importance to the trade in determining the qualities of plug chewing tobacco or its popularity on the market, but it is the custom of all manufacturers of plug chewing tobacco to adopt and fix to their products certain peculiar names, marks and brands, by which such products are known to the trade and on the markets; and these defendants charge the truth to be that most of the plug chewing tobacco manufactured by the complainant is known on the market by names, brands, marks and devices of which the name of the complainant forms no part; and these defendants expressly aver that they do not intend that the corporation they propose to form shall use any name, brand or device employed by the complainant, or any resemblance or similitude thereof.

"*Twelfth*—And these defendants further answering, say that they deny that any confusion in the correspondence of the complainant and of these defendants, or any of them, or the corporation they propose to organize by the name of 'Drum-

mond-Randle Tobacco Company,' has occurred or happened on account of any real or supposed similarity of their respective names, and they deny that dealers in the market will, in any way, be confused or misled in the false belief that the two corporations are the same. And these defendants further answering, say that the said complainant has, in effect, abandoned the city of Alton, as its place of business and its principal office is no longer there, and it now carries on a nominal business there; that the fact is, that in the month of November, 1884, the said complainant sold its business establishment in the city of Alton, with all its machinery and business fixtures, to one Horatio N. May, of Chicago, Illinois, and finally, early in the month of January, 1885, the remaining stockholders in the complainant, after the withdrawal of the defendants Drummond, Randle and Hayner therefrom, with other persons unknown to these defendants, organized a corporation under the laws of the State of Missouri, with its principal office and place of business in the city of St. Louis, by the name of 'Drummond Tobacco Company;' and these defendants are informed and believe, and therefore charge it to be true, that the said complainant has sold and transferred to the Missouri corporation of the same name, all its property, with some trifling exceptions,—which last named property is only retained in order to preserve the existence of the complainant as an Illinois corporation, and to embarrass and hinder these defendants from engaging in the business of manufacturing plug chewing tobacco, by the name of 'Drummond-Randle Tobacco Company' or otherwise, while, in fact, for all business purposes the complainant has practically ceased to exist in Illinois."

Replication was filed, and, by agreement, certain affidavits taken and read on a motion to dissolve the injunction, were read and considered, together with certain oral evidence, as the evidence in the case. The court decreed that the bill be dismissed.

Messrs. G. & G. A. KOERNER, and Messrs. SMITH & HARRISON, for the appellant;

The name of a corporation is a part of its franchise, and the courts will protect it in the exclusive use of such name. 1 Blackstone's Com. 475; Boone on Corp. sec. 32; High on Injunctions, sec. 687; Taylor on Corp. sec. 158.

The use of the name of a corporation is analogous to, if not stronger than, piracy upon an established trade-mark. *Newby* v. *Railroad Co.* Deady, 609; 8 Paige, 75; 11 id. 292; 2 Barb. Ch. 102; Willard's Eq. 402.

As to enjoining use of similar names, see *Holmes, Booth & Hayden* v. *Manufacturing Co.* 37 Conn. 278; *Ex parte Walker,* 1 Tenn. Ch. 97; Cox on Trade-marks, 475; *Sykes* v. *Sykes,* 3 B. & C. 541; *Croft* v. *Day,* 7 Beav. 84; *Life Ins. Co.* v. *Insurance Co.* 50 L. J. 253.

The statute (Rev. Stat. chap. 32, sec. 2,) provides that no license shall be issued for the formation of two companies having the same name. This means they shall not be substantially the same. See, also, section 5, chapter 32, of the Revised Statutes. Reference is also made to *Manufacturing Co.* v. *Hall,* 61 N. Y. 226; *Bradbury* v. *Dickens,* 27 Beav. 53; *Woodward* v. *Logan,* 21 Cal. 448; *Hazard* v. *Caswell,* 57 How. Pr. 1; *Christy* v. *Murphy,* 12 id. 77; *Howe* v. *Machine Co.* 50 Barb. 236; *Hogg* v. *Kirby,* 8 Ves. 215; *Singer Manf. Co.* v. *Wilson;* 47 L. J. 481; *Taylor* v. *Taylor,* 23 id. 255; *Williams* v. *Brooks,* 50 Conn. 278.

The franchise of a corporation is within the meaning of the term "franchise," as used in the constitution, and in the act providing for appeals to the Supreme Court. *Railroad Co.* v. *Dunbar,* 95 Ill. 577.

Mr. JOHN G. IRWIN, for the appellees:

The names of the two corporations are different, and no fraud is charged in the bill. The want of fraud is sufficient to defeat the bill, and besides, the injunction was premature.

The complainant had practically ceased doing business, and could not have been injured.

The right of an individual to use his own name is unlimited. A person of one name can not prevent another of the same name from using his name in business, although such use causes loss and injury; nor can a person obtain a trademark in a name as against another person of the same name. *Halloway* v. *Halloway*, 13 Beav. 209; *Burgess* v. *Burgess*, 22 L. J. 675; *Clark* v. *Clark*, 25 Barb. 75; *Comstock* v. *White*, 18 How. Pr. 421; *Burninger* v. *Wattles*, 28 id. 206; *Faber* v. *Faber*, 49 Barb. 357; *Stonebraker* v. *Stonebraker*, 33 Md. 352; *Taylor* v. *Taylor*, 22 L. J. 255; *Ainsworth* v. *Ainsworth*, 35 id. 352; *Meenely* v. *Meenely*, 62 N. Y. 427; *Decker* v. *Decker*, 52 How. 218; *Carmichael* v. *Carmichael*, 11 R. I. 395; *Gilman* v. *Hunnewell*, 122 Mass. 139; *McLean* v. *Fleming*, 96 U. S. 245.

Messrs. PALMERS, ROBINSON & SHUTT, also for the appellees:

That no franchise is involved, see *Board of Trade* v. *People*, 91 Ill. 80; *Hesing* v. *Attorney General*, 104 id. 292.

Counsel also discussed the facts and other points.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

It was incumbent on the complainant below (appellant here) to show, by such a preponderance of evidence as would reasonably satisfy the mind of the chancellor, that the incorporation of the Drummond-Randle Tobacco Company would so injure it as to justify the issuing of a writ of injunction. The injury must be of a substantial character, and not merely fanciful or conjectural. The complainant is a domestic corporation, and as such seeks relief. Obviously, under this bill a foreign corporation, although of the same name, composed of the same stockholders and having precisely the same shares of stock, would not be entitled to relief, for it would still be

another and entirely distinct and different corporation, existing under different laws, and if entitled to protection here, so entitled under different principles of law. It is not pretended that the mere process of manufacturing tobacco is in anywise affected by the name of the corporation. It is the business of buying, selling, exchanging, etc., only, that is claimed to be thus affected.

The defendants make the following among other allegations in their answer: "That the said complainant has, in effect, abandoned the city of Alton, as its place of business and its principal office is no longer there, and it now carries on a nominal business there; that the fact is, that in the month of November, 1884, the said complainant sold its business establishment in the city of Alton, with all its machinery and business fixtures, to one Horatio N. May, of Chicago, Illinois, and finally, early in the month of January, 1885, the remaining stockholders in the complainant, after the withdrawal of the defendants Drummond, Randle and Hayner therefrom, with other persons unknown to these defendants, organized a corporation under the laws of the State of Missouri, with its principal office and place of business in the city of St. Louis, by the name of 'Drummond Tobacco Company;' and these defendants are informed and believe, and therefore charge it to be true, that the said complainant has sold and transferred to the Missouri corporation of the same name, all its property, with some trifling exceptions,—which last named property is only retained in order to preserve the existence of the complainant as an Illinois corporation, and to hinder these defendants from engaging in the business of manufacturing plug chewing tobacco, by the name of 'Drummond-Randle Tobacco Company' or otherwise, while, in fact, for all business purposes the complainant has practically ceased to exist in Illinois." The evidence preserved in the record, which consists in part of affidavits read upon the hearing by agreement of counsel, sustains at least so much of this

allegation as relates to the entire business of buying, selling, trading, etc.

James T. Drummond, the principal stockholder in the complainant, in his affidavit admits the incorporation of the Drummond Tobacco Company, with its principal office or place of business in the city of St. Louis, under the laws of the State of Missouri, but seems to regard this as being in some way but a continuance of the Drummond Tobacco Company incorporated under the laws of this State, with its principal office or place of business in the city of Alton. He says: "Complainant has recently formally incorporated in the State of Missouri, under its own corporate name of 'Drummond Tobacco Company,' but not for the purpose of abandoning Alton as a manufacturing point by complainant, but for the purpose of convenience," etc. A corporation created under the laws of one State, may, by virtue of inter-State comity, be permitted to do business as a corporation in another State; but the elements which are essential to a corporation are such that it is impossible that a corporation created under the laws of one State can be incorporated into another corporation created under the laws of another State, as an integral part thereof, as is here alleged. What was really meant is manifest by another portion of the affidavit, where he says, "that said Missouri corporation really forms part and parcel of complainant, was organized by the same persons, with one exception, and the two corporations expect to work together in unison, as practically one and the same body, hereafter as heretofore known as 'Drummond Tobacco Company,' dealing in the same markets and with the same customers, and in the same class of goods." Fairly paraphrased, all the stockholders of the complainant but one, to facilitate the business of the complainant organized as a corporation, with the same name, and to carry on the same business, at St. Louis, under the laws of the State of Missouri,—making, in fact and in law, two entirely distinct and independent cor-

porations. The only unity is in the ownership of the stock. But this is of no consequence, because there is nothing in the law to prevent adverse ownership in this respect hereafter, and the moment the stock of the two corporations shall pass into different hands, the corporations will become independent, in fact as well as in legal contemplation. Beyond all question they may now lawfully contract with each other. They may acquire rights and transact business inimical to each other, and they may sue each other, and make defence thereto, just as different natural individuals may do.

The only real controversy in the case is, whether the business of buying and selling and exchanging with the public, in general, has been abandoned by the complainant since the creation of the Missouri corporation. James T. Drummond, in his affidavit, denies that such is the fact, though more stress is laid therein on the abandonment of Alton as a place of manufacture than we think is important, since if we shall concede that Alton is not abandoned as a place of manufacture, yet if all the buying and selling and trading done by the complainant is by, to and with the Missouri corporation of the same name, no injury is shown likely to result to the complainant by the incorporation of the defendant, for it is not claimed or pretended that the creation of that corporation will mislead or confuse, or otherwise injure, the complainant in buying or selling or trading from, to or with the Missouri corporation. It is only the public at large—those who would not understand the difference between the names of the complainant and that of the Drummond-Randle Tobacco Company, or who would fail to keep in mind that difference—that it is alleged would be misled and injured thereby.

James T. Drummond is, to some extent, sustained by William Agne, book-keeper and cashier of the Drummond Tobacco Company, and by George T. Bailey, shipping clerk of that company, in his assertion that the business of the complainant in buying, selling, etc., has been carried on with

the public since the creation of the Missouri corporation the same that it was before; but he is directly contradicted by the affidavits of John N. Drummond, Charles H. Randle and John E. Hayner, who each and all swear therein: "That in the year 1880 the Drummond Tobacco Company started a manufactory in St. Louis, Mo., and the business there was called the St. Louis branch; that the object in starting the St. Louis factory was, that it was supposed that St. Louis possessed superior advantages for manufacturing tobacco, and selling it to those at Alton, Illinois, where, previous to that time, the manufacturing business of the company had been carried on; that it was also the intention to gradually cease doing business in Alton, Illinois, and transfer the entire business to St. Louis, Mo.; that the capacity of the factory in St. Louis, which was started in 1880, was about equal to the capacity of the factory at Alton, Illinois, and in carrying out the intention of ultimately transferring the entire business to St. Louis, the Drummond Tobacco company purchased the block of ground in St. Louis, Mo., bounded by Third, Fourth, Spruce and Almond streets, known as the Sisters' Hospital block, for which it paid $75,000, and erected on the said block a large stemery and warehouse for the storage of the raw material, which greatly increased the facilities for manufacturing and carrying on the business in St. Louis; that further carrying out the intention, a large building, which was intended to be used as a factory, was also erected on said block, said building, in connection with the said stemery and warehouse, when in running order as a factory, having a capacity to make from twelve to fifteen million pounds of plug chewing tobacco per year; that further carrying out said intention, the business done at Alton was gradually transferred to the St. Louis branch, so that in the year 1883 the factory at Alton, Illinois, was only run to about half its capacity, while the St. Louis factory was increased and run to its fullest capacity; that in the year 1884 the Alton factory only made

about two hundred and seventy-five thousand pounds, while the St. Louis factory made all the rest of the tobacco the company manufactured and sold that year, amounting to about six million pounds, and while the St. Louis branch and factory that year made large profits, the factory in Alton, Illinois, lost money to the company; that further carrying out said intention, James T. Drummond, the principal and largest stockholder in the company, and its general manager, removed his residence from Alton, Illinois, to St. Louis, Mo., and purchased a palatial home there, he doing so, so as to better enable him to manage and increase the business in St. Louis; that further carrying out said intention, James T. Drummond, as general manager of the said Drummond Tobacco Company, negotiated with Horatio N. May, of Chicago, Illinois, for the sale of the factory at Alton, Illinois, which belonged to the company there, and sold said factory and machinery to said May for $10,000, said factory and machinery having cost the company, first and last, about $40,000, and James T. Drummond's act was confirmed by the company, and a deed made by its officers to said May for said property, for the reason that it was considered that as the business was now in shape to and would soon be carried on in St. Louis, it was best to sell the Alton factory while an opportunity existed; that in January, 1885, the undersigned were offered by said James T. Drummond a price for their stock in the Drummond Tobacco Company, which they accepted; that they transferred their stock in said company to the said James T. Drummond; that at the time Charles H. Randle and John N. Drummond were directors of said company, and, with James T. Drummond, formed the board of directors of said company; that James T. Drummond then stated to them that he desired and intended to wind up the business of the company at once; that he would organize a corporation under the laws of Missouri, and the Drummond Tobacco Company of Alton, Illinois, would then transfer and sell out to the said Drummond

Tobacco Company of St. Louis, and the Drummond Tobacco Company of Alton, Illinois, would then dissolve by surrendering its organization or charter; that said James T. Drummond requested Charles H. Randle, as he was familiar with the business of said company, and being its secretary, to continue to act as secretary and director until the business of the said Drummond Tobacco Company of Alton, Illinois, was wound up, and the corporation dissolved; that said Charles H. Randle declined so to act; that said James T. Drummond then requested said Charles H. Randle and John N. Drummond not to both resign at once as directors of said Drummond Tobacco Company of Alton, Illinois, as it would leave him without a quorum in the board of directors, but for him (Charles H. Randle) to resign first, and he (James T. Drummond) would then transfer to Levi Davis, Jr., of Alton, Illinois, two shares of stock, so as to enable him to be a director, and also to act as secretary of the company until its dissolution; and then, when Levi Davis, Jr., had been elected a director in place of said Charles H. Randle, John N. Drummond could resign, and J. L. Curby, of St. Louis, Mo., would be elected in his (John N. Drummond's) place, as director, and thus he would have a board of directors to enable him (James T. Drummond) to make the necessary transfers to the Drummond Tobacco Company of St. Louis, Mo., as soon as incorporated, and to dissolve the corporation at Alton, Illinois; that to please said James T. Drummond, they (Charles H. Randle and John N. Drummond) did as he, the said James T. Drummond, desired in that respect, and that programme was carried out, and the board of directors of said company is now composed of James T. Drummond, Levi Davis, Jr., and J. L. Curby; that Levi Davis, Jr., owns two shares, or $200, J. L. Curby fifty shares, or $5000, and James T. Drummond nine hundred and forty-eight shares, or $94,800; that in accordance with that intention to close up the business of the Drummond Tobacco Company of Alton, Illinois, and to

incorporate another company of the same name in the city of St. Louis, State of Missouri, said James T. Drummond and others did organize, and have incorporated under the laws of the State of Missouri, the Drummond Tobacco Company of St. Louis; that after the incorporation of the Drummond Tobacco Company of St. Louis, Mo., the Drummond Tobacco Company of Alton, Illinois, bargained and sold to the Drummond Tobacco Company of St. Louis, Mo., all the property it then owned at St. Louis, Mo., including all its trade-marks, brands, devices, patents, and licenses under patents, retaining only its corporate name, two brands, and some manufactured tobacco at Alton, Illinois, which tobacco was not sold, because, if sold and removed, the government stamps would at once have to be placed on each box, while it could remain unstamped until sold; that the Drummond Tobacco Company of Alton, Illinois, to-day has no factory in Alton, Illinois, or elsewhere,—is a mere shadow, the substance having been transferred to the Drummond Tobacco Company of St. Louis, Mo.; that it never was the intention to have two Drummond Tobacco Companies, each having the same name, one in St. Louis, Mo., and one in Alton, Illinois, but it was the intention to have all that belonged to the Drummond Tobacco Company of Alton, Illinois, transferred to its namesake in St. Louis, Mo., and the only reason why, as affiants believe, the Drummond Tobacco Company of Alton, Illinois, is still kept alive, instead of being dissolved, as was intended and agreed, is for the purpose of annoying and vexing affiants, and for the purpose of trying, without reason or justice, by this vexatious proceeding to prevent, if possible, these affiants from completing the organization of the Drummond-Randle Tobacco Company, of which they are stockholders."

William Agne also made another affidavit at the instance of defendants. In the first he had stated that he believed the Drummond Tobacco Company would start another factory at

Alton. In his last affidavit he explains that that statement was made on the faith of what he had heard James T. Drummond say upon the subject after this suit was commenced. He then adds, "that the Drummond Tobacco Company has no machinery of any description to manufacture tobacco in Alton, Illinois; that the Drummond Tobacco Company, since the sale of its factory in Alton, Illinois, has kept no accounts on its books, here, with any customer except the Drummond Tobacco Company of St. Louis, Mo.; that the Drummond Tobacco Company of St. Louis, Mo., makes the sales of the remnant of the stock of tobacco now on hand, and the tobacco so sold is shipped or sent, when it has been ordered, by the Drummond Tobacco Company of St. Louis, Mo."

We can not say that the court below erred in holding that the evidence in favor of the complainant did not preponderate over that of the defendants upon this issue. No authority cited by the counsel for complainant holds, and we are aware of none not cited by them which holds, that the use of a name in a corporation will be enjoined unless it is made to appear, by all the circumstances, that the proposed use of the name will likely result in injury to the complainant. The postmaster at Alton is positive in his evidence that there is no reasonable liability of the mail matter of the complainant being delivered to the proposed corporation, the Drummond-Randle Tobacco Company, and the evidence fails to satisfy us, that in telegraphing, expressing and shipping by the Drummond Tobacco Company at St. Louis to and from the complainant at Alton, there is likely to be confusion and annoyance, leading to injurious results, because of the Drummond-Randle Tobacco Company doing business at Alton. All the evidence showing the probability of injury resulting from the use of the word "Drummond" in the name "Drummond-Randle Tobacco Company," is predicated upon the hypothesis that such name is to be used in the trade with the public, and that that company and the complainant will, in the future,

be competitors before the same public for the same trade. But that hypothesis, we have seen, is effectually excluded by the affidavits of John N. Drummond, Randle, Hayner and Agne.

The objection to the assessment of damages is not tenable. The record was amended during the term, showing these damages to have been assessed at the proper time, and this amendment was within the power of the court. (*Frink et al.* v. *King*, 3 Scam. 144.) The amended record shows suggestions of damages filed before the question had passed beyond the control of the court, and the evidence authorized the amount decreed.

We perceive no ground upon which to reverse the decree below. We are of opinion that the appeal was properly prosecuted directly to this court. The creation of a corporation (and to be a corporation is itself a franchise) was sought to be enjoined. All the steps taken to form a corporation were to form one by the name of the "Drummond-Randle Tobacco Company." If a corporation could not be formed by that name, none could be formed under the steps then taken to form a corporation, there being no provision in the statute authorizing the Secretary of State to reject the proposed name and substitute another. A new corporation could, of course, be formed by the same parties, but this would involve an abandonment of the first essay in that direction, and the initiating of new proceedings.

The decree is affirmed.

Decree affirmed.

Syllabus. Brief for the Appellant.

D. S. VANPELT

v.

T. W. HUTCHINSON *et al.*

Filed at Mt. Vernon September 25, 1885.

1. EVIDENCE—*to impeach a decree for fraud.* A decree having been rendered upon merely constructive notice by publication, on the claim the defendant was a non-resident, and his place of residence not known, it was sought to impeach the decree for fraud, on the allegation that there was not proper diligence used to ascertain the place of residence of the defendant, and by reason thereof he was not notified by a copy of the notice published being sent to his post office address, as might and ought to have been done; but upon a review of the evidence it was not deemed sufficient to impeach the decree upon that ground.

2. SAME—*want of recollection in one witness as against affirmative testimony of another.* The statement of a witness that he does not remember having a certain alleged conversation with another, will not be regarded as a contradiction of the affirmative testimony of the latter that such conversation was had.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Richland county; the Hon. WILLIAM C. JONES, Judge, presiding.

Mr. RUFUS COPE, for the appellant:

The affidavit of non-residence is, that affiant "is informed and believes that Vanpelt is not a resident," etc. Under a former statute an affidavit on information or belief, in attachment cases, was held insufficient. *Dyer* v. *Flint*, 21 Ill. 83; *Booth* v. *Reese*, 26 id. 48.

While a positive averment of non-residence may not be required, it should be such as to justify the court in finding that fact. A may be informed and believe that B is a non-resident, without taking any care to know that his information is reliable. The statute, in distinguishing between a non-resident and a party who on due inquiry can not be found,

makes a demand for the exercise of care. *Ex parte Haynes*, 18 Wend. 611.

As to the construction of similar statutes, see *Ricketson* v. *Richardson*, 26 Cal. 149; *Forbes* v. *Hyde*, 31 id. 342; *Hartung* v. *Hartung*, 8 Bradw. 157; *Adams* v. *Merritt*, 10 id. 275; *Macubin* v. *Smith*, 5 Minn. 357; *Carleton* v. *Carleton*, 85 N. Y. 313.

Messrs. WILSON & HUTCHINSON, for the appellees:

As to the presumption of due service of notice in favor of a decree of a court of general jurisdiction, see *Wenner* v. *Thornton*, 98 Ill. 157; *Magill* v. *Brown*, id. 235.

The affidavit in this case was positive as to due diligence having been used to learn the residence of Vanpelt, and in such case the party could not be required to state the defendant's non-residence. The fact that he could not be found on due inquiry, authorized the publication.

The allegations of the bill which were denied, were not supported by any evidence or proof. On the contrary, the decree finds the fact of non-residence, and due inquiry without success.

Per CURIAM: In October, 1872, Robinson and wife mortgaged two lots in Olney, to Vanpelt, to secure the payment of three promissory notes of that date, for $346.67, due, respectively, in one, two and three years from date, with interest at eight per cent per annum. At the June term, 1876, of the Circuit Court of the United States, held at Springfield, Vanpelt, having previously sued out a *scire facias* on the mortgage, recovered a judgment of foreclosure thereon, and an award of a special *fieri facias* for a sale thereunder, of the mortgaged property, but no sale was ever had, nor did any *fieri facias* ever issue, pursuant to said judgment. On the 10th of April, 1876, Barlow filed in the office of the clerk of the circuit court of Richland county, a petition for a mechanic's lien against the lots, making Robinson and wife, and Vanpelt, defendants

thereto. Decree was rendered by the Richland circuit court, at its November term, 1877, in conformity with the prayer of the petition, establishing the lien and directing that the premises be sold for the payment of the amount due the petitioner. The property was sold by Wilson, master in chancery, by virtue of this decree, and purchased by Hutchinson, who was Barlow's attorney. No redemption having been effected within the time provided by statute, the master in chancery executed a deed to Hutchinson. McDonald became the owner of a tax title upon the property, under sale for delinquent taxes, subsequent to the mortgage. On the 9th of May, 1874, Robinson obtained a sheriff's deed to himself for the undivided one-fourth interest of one William C. M. Roberts in the property, and on the 19th of April, 1883, he executed to Wilson a quitclaim deed for the property. Afterwards it was mutually agreed between Hutchinson, Wilson and McDonald that each should be the owner of one-third of the property, and that they should thereafter own and hold as tenants in common, in accordance with that agreement.

On the 30th of June, 1883, Vanpelt filed in the office of the clerk of the circuit court of Richland county, his bill to review the proceeding on the petition for the mechanic's lien, making Robinson, Barlow, Hutchinson and Wilson, and the heirs-at-law of the wife of Robinson, who had died intestate since the rendition of the decree sought to be reversed, defendants thereto. The bill alleges that complainant, while said mechanic's lien proceedings were pending, long previous thereto, and ever since, was and has been a resident of the city of Cincinnati, in the State of Ohio; that he had no notice whatever of the said proceedings, and no knowledge thereof, until the month of June, A. D. 1883; that the only manner in which complainant was made a party to said proceeding was by publication of notice in the "Olney Times" to one "D. S. Vanpelt," which notice was based on the affidavit of said T. W. Hutchinson, the attorney for said Barlow, in

the words following: "T. W. Hutchinson, being duly sworn, on oath states that he is solicitor for the complainant in the above named cause; that the respondent, D. S. Vanpelt, who is returned on the summons 'not found,' is, as affiant is informed and believes, not a resident of this State, and upon diligent inquiry he has not been able to learn the residence of said defendant." It is further alleged, that at the time when said affidavit of non-residence was made, the recitals in the mortgage of Robinson to complainant, of record, showed that he was a resident of Cincinnati, and that the fact of such residence was personally well known to Robinson, and that Robinson was well known to Hutchinson. It is charged that Hutchinson had all necessary knowledge to enable him, by reasonable inquiry, to have ascertained the complainant's residence, but that he did not use due diligence in the matter, but proceeded with gross negligence, and indifference to the complainant's rights. The bill charges that the affidavit is insufficient to authorize the publication, "for the further reason that the non-residence of the complainant is stated only on information and belief, and that it does not appear by positive averment that said Hutchinson had employed due diligence" to ascertain complainant's address. These are the errors, and the only errors, alleged, on account of which it is prayed the former decree may be reviewed and reversed.

The answer of Hutchinson alleges that he is, by the bill, for the first time informed of the residence of Vanpelt; that summons was issued in said suit for lien, for said Vanpelt, to the sheriff of Richland county, and it was returned by him not found; that upon diligent inquiry the place of residence of said Vanpelt could not be ascertained, and therefore notice to him was given by publication, such affidavit having been filed, as was required by law, in the office of the clerk of the circuit court in which said suit was pending, showing that on due inquiry said D. S. Vanpelt could not be found, and that upon diligent inquiry his place of residence could not be

ascertained; that respondent does not know the residence of complainant, except from the bill, and while the city of Cincinnati is given, in his mortgage, as his place of residence in the year 1872, he does not know whether the facts alleged were known to Robinson, but respondent was informed, and verily believed at that time, that said Vanpelt did not reside in Cincinnati, but had removed to some place in the interior of the State of Ohio, but respondent could not learn where, although he made all due and diligent inquiry, etc.

The statute in force when the decree in the petition for a mechanic's lien was rendered, provides: "When any defendant resides or has gone out of the State, or on due inquiry can not be found, * * * so that process can not be served upon him, the complainant or petitioner may cause notice to be given to him in like manner and upon the same conditions as provided in suits in chancery." (Rev. Stat. 1874, chap. 82, sec. 7.) The 12th section of chapter 22, of the Revised Statutes of 1874, entitled "Chancery," provides: "Whenever any complainant or his attorney shall file in the office of the clerk of the circuit court in which his suit is pending, an affidavit showing that any defendant resides or hath gone out of this State, or on due inquiry can not be found, * * * and stating the place of residence of such defendant, if known, or that upon diligent inquiry his place of residence can not be ascertained, the clerk shall cause publication to be made."

The allegation of the bill that the affidavit of Hutchinson states the non-residency of Vanpelt on information and belief, is not admitted in the answer. But the answer, as has been seen, shows the filing of an affidavit in the office of the clerk of the circuit court, asserting, without qualification, that on due inquiry "D. S. Vanpelt could not be found, and that upon diligent inquiry his place of residence could not be ascertained,"—and this is all that the statute requires that the affidavit shall contain. The record fails to show that any evidence was offered of the contents of the affidavit. The

only reference to it is in the decree enforcing the lien. It recites, "the said D. S. Vanpelt is a non-resident of the State of Illinois, the place of whose residence the complainant, after diligent inquiry, was unable to learn,"—and this, clearly, does not sustain the allegation in the bill. The record should have been proven to be erroneous in the respect complained of. This should have been proven, the fact not having been admitted, by the production of the record itself, or if it was lost or destroyed, then by secondary evidence of its contents.

The fact that Vanpelt was a non-resident is admitted; but counsel for complainant insist that his residence was or might have been known, and he notified by a copy of the notice published, sent to his post office address. They seek to impeach the decree for fraud in failing to give this notice. The burden is, of course, on the complainant. The only proof offered to show that Hutchinson knew of Vanpelt's residence, is the record of the mortgage from Robinson, in which it is recited as being at Cincinnati, Ohio, and the testimony of Robinson that he knew that Vanpelt resided at Cincinnati, and that he had no recollection that Hutchinson asked him where Vanpelt resided. This evidence is rebutted by the testimony of Hutchinson, who testifies that his client, Barlow, did not know where Vanpelt resided; that he, himself, did not know where he resided; that he made all the inquiry that he could, and was unable to obtain such information; that he went to Robinson and asked him, and that Robinson informed him that Vanpelt had resided at Cincinnati, but that he had removed therefrom to some point up in the centre of the State, he did not know where. Hutchinson is positive in his statement,—Robinson does not recollect the conversation. The evidence of the latter, therefore, does not contradict that of the former. Under this evidence we can not hold that the decree is impeached for fraud.

The decree is affirmed.

Decree affirmed.

Syllabus.

ROBERT RANKIN

v.

BARCROFT & CO. *et al.*

Filed at Mt. Vernon September 25, 1885.

1. CONVEYANCE IN TRUST *to secure creditors—preference of creditors—what creditors to be preferred, within the terms of an agreement—whether a lien is necessary.* An agreement between a debtor and a trustee to whom the former had land conveyed to secure his creditors, provided that the trustee should sell the lands and apply the proceeds, first, to the payment of all incumbrances on the land, whether secured by mortgage or otherwise, amounting to $16,000, after which other debts were to be paid. It appeared that at the date of the conveyance and agreement, the debtor owed A $12,000 and B $4000, which debts were not incumbrances or liens on the lands, but no one else claimed such preference, and also that the debts due A and B were those intended by the parties, and that the trustee afterward, by his letter, and schedule and exhibit in bankruptcy, declared that he held the lands in trust to secure the claims of A and B: *Held*, that the fact that the debts of A and B were not liens upon the lands could not defeat the trust, and that they were entitled to be first paid out of the proceeds of the lands.

2. SAME—*subrogation—in favor of trustee or debtor paying preferred debt.* Where a person accepts time drafts drawn on him by a debtor in favor of a creditor, and takes a conveyance of land in trust, out of which to pay, first, such indebtedness, and afterward other debts, and he pays a portion of such preferred debt, he will not be entitled to be subrogated, as to such payment, to a prior lien which may be held by the preferred creditor. In such case, the person making the payment occupies the position of mortgagor or debtor, and has no preference, as to the payment made, over the other creditors secured.

3. SAME—*bankruptcy—its effect upon trust property in the hands of a bankrupt.* Upon an adjudication in bankruptcy, the debt due a trustee so adjudged, if any, on account of his trust, and his property rights in lands held by him in trust, pass to his assignee, but his duties as trustee remain unaffected by the proceeding. If any claims in favor of the trustee vest in his assignee which are prior liens upon the trust lands, it is the duty of the trustee to pay them off, and for so doing he is entitled only to the sum paid by him.

4. SAME—*declaration of trust—at what time it may be made.* Where lands have been conveyed to one without any attempt to declare a trust at the time, but a trust was intended, he may afterward, by letter or any other instrument in writing, declare that he holds the same in trust, and such dec-

laration of trust will be binding. The right to thus declare a trust in the first instance implies the right to make certain and specific a trust before attempted to be declared.

5. TRUSTEE—*speculation in respect to trust fund.* A court of equity will not permit a trustee to speculate in the subject matter of his trust. If he purchases an outstanding claim against the trust fund, the transaction will be treated as a payment only, and he will be allowed only what he paid for it.

6. PARTIES IN CHANCERY—*on bill to enforce a trust in favor of creditors—personal representations of a deceased creditor—heirs as representing debts due the ancestor—in equity.* A conveyance of land was made in trust, to secure certain creditors, one item of the indebtedness intended to be secured being described as a claim of the estate of S. Seven years afterward, certain other creditors secured, filed their bill against the trustee, to enforce the trust, making the unknown heirs of S. parties. No objection was made in the court below that the administrator or executor of S. was not made a party, but this objection was first made in the Appellate Court: *Held*, that it would be presumed the estate of S. was settled after so great a lapse of time, and that this part of the estate had vested in his heirs, in the absence of anything appearing to the contrary. In equity the title is treated as being where, in good conscience, it ought to be.

7. After the settlement of an estate the heirs of the decedent will, in equity, be treated as the owners of any uncollected claim due the estate; and if they are made parties to litigation involving the collection of such claim, the debtor will be protected in making payment to them.

8. CHANCERY PRACTICE—*submitting interlocutory decree to opposite solicitors.* Where an interlocutory decree is clearly supported by the evidence, and is in accordance with the minutes of the judge, and it is approved and adopted in the final decree, a reversal will not be made for the reason that the same was not submitted to solicitors on the other side, before being signed by the chancellor.

9. SAME—*failure to grant leave to amend cross-bill.* Where a demurrer is properly sustained to a cross-bill which shows no ground for affirmative relief, and the record fails to show that leave to amend the same was asked, or that any amendment could have been made, consistent with the facts as proved, which could have obviated the objection thereto, an objection that no time was given to amend the cross-bill is destitute of merit.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

Statement of the case.

This was a bill in equity, exhibited in the circuit court of Randolph county, by Barcroft & Co., a mercantile firm, composed of Mary A. Barcroft and Samuel K. Kille, executors of the last will and testament of Stacy B. Barcroft, deceased, Jacob T. Fine, Samuel K. Kille and William M. Reink, of the city of Philadelphia, and Elizabeth Baker, Hannah Swanwick and Susannah Swanwick, executors of the last will, etc., of John Swanwick, deceased, against Robert Rankin, Thomas M., Joseph B., Jr., William M., Shadrach B. and Edward Holmes, and Achsah, Charles and Mary J. Hartzell, heirs-at-law of Joseph B. Holmes, deceased.

It is alleged that in the year 1871 certain real estate therein described "was held by one Thomas Beaver in trust, to secure to the firm of Barcroft & Co., composed of the complainants now composing said firm, and also of one George Lee, who has since retired from said firm, the payment of an indebtedness due said firm from Joseph B. Holmes, now deceased, amounting, on the first day of May, 1871, to the sum of $12,000; that on the first day of May, 1871, by agreement with the then firm of Barcroft & Co. and the said Joseph B. Holmes, the said Thomas Beaver and wife conveyed said above described lands to the said Joseph B. Holmes, deceased; that the only consideration given for said conveyance of said lands were the time drafts of the said Joseph B. Holmes, deceased, three in number, for the sum of $4000 each, payable in two, three and four years from date, respectively, all bearing date the first day of May, 1871, drawn upon the defendant Robert Rankin, and accepted by said Rankin in favor of the said firm of Barcroft & Co., and also certain other time drafts of said Joseph B. Holmes, drawn in favor of said firm of Barcroft & Co., upon said defendant Robert Rankin, and accepted by him, eight in number, all bearing date May 1, 1871, for interest upon said three first mentioned time drafts during the time the same were maturing, payable in six months, one year, eighteen months, two years, thirty

months, three years, forty-two months, and four years, respectively; that two of said time drafts, for $4000 each, payable in three and four years from date, respectively, and four of said drafts drawn for interest upon said principal sum of $12,000,—one for $240, payable in thirty months from date, one for $240, payable in thirty-six months from date, one for $120, payable in forty-two months from date, and one for $120, payable in forty-eight months from date,—remain due and unpaid, and are all held and owned by your orators now composing the firm of Barcroft & Co.; that the said Joseph B. Holmes, now deceased, was in his lifetime, to-wit, on the first day of April, 1871, and had been long prior to that time, indebted to John Swanwick, late of said Randolph county, now deceased, in the sum of $4000, the precise character and nature of which indebtedness your orators are not advised, but they here aver the same was, by the said Holmes and said Swanwick and said defendant Rankin, considered and treated as a lien upon a part of the lands hereinafter described, at that time, and that the said Joseph B. Holmes, deceased, being so indebted on the first day of April, 1871, drew his two certain time drafts of that date, for the sum of $2000 each, payable to the said John Swanwick in three and four years from date, respectively, and also eight other time drafts for interest upon said two first mentioned time drafts, during the time said first mentioned time drafts payable to said John Swanwick were maturing, payable in six months, one year, eighteen months, two years, thirty months, three years, forty-two months, and four years from date, respectively, all of which said time drafts were accepted by the said Robert Rankin on the 10th day of April, 1871, and delivered to the said John Swanwick, deceased; that said two time drafts for $2000 each, and one of said interest acceptances for the sum of $120, payable on the first day of April, 1874, one for $60, payable on the first day of October, 1874, and one for $60, payable on the first day of April, 1875, are due complainants

Elizabeth Baker, Susannah Swanwick and Hannah Swanwick, executrix of the will of John Swanwick, deceased; that prior to the said conveyance of the lands by Beaver and wife to Holmes, deceased, Holmes had executed a deed for the same and other lands to Rankin; that the lands in this deed described were to be held by Rankin in trust; that the date of this deed is February 24, 1871, the consideration mentioned in the deed is one dollar, the number of acres is one thousand three hundred and fifty-one; that the said Robert Rankin, at the time the deed from Holmes and wife to Rankin was executed, entered into a written agreement with said Holmes, to the effect that he would sell said lands in said deed described, and apply the proceeds of such sales first to the payment of all incumbrances on said lands, whether the same were secured by mortgage or otherwise, amounting at that time to the sum of $16,000, said agreement being in the nature of an equitable mortgage upon the premises described in said deed; that said claims referred to in said agreement to be first paid from the proceeds of the sale of said lands, amounting at the date thereof to the sum of $16,000, were the claims of the complainants evidenced by said time drafts; that the deed from Beaver to Holmes was obtained upon the faith of said agreement, and said time drafts accepted by said Barcroft & Co. and said John Swanwick in confidence that said Holmes and said Rankin would faithfully keep and discharge their promises, at the time said time drafts were made and accepted, and that said Rankin would sell said lands, and from the proceeds of the sale pay off the said time drafts that were then and there, both by said Holmes and Rankin, recognized as representing said sum of $16,000 that was declared to be a charge upon said lands described in said deed from said Holmes to said Rankin, and was to be first paid out of the proceeds of the sale of said lands; that both Rankin and Holmes have admitted that said time drafts were secured by said agreement, and were a first charge upon said

lands so held by Rankin, and that Rankin held said lands as trustee, only; that Rankin has been declared a bankrupt, and obtained his discharge in bankruptcy, and that the estate of Holmes is insolvent; that Rankin refuses to sell the lands, but still holds the title to the same, except eighty acres in the bill described, sold under a prior deed of trust." The bill prays that the defendants may be required to answer, but not under oath; that an account may be taken of the amount due complainants on said acceptances, under said agreement between Holmes and Rankin; that upon the taking of the account, Rankin be ordered to sell the lands described in the deed from Holmes to Rankin, except eighty acres owned by the complainant Susannah Swanwick, or so much as may be necessary to pay the amount found due complainants, and costs of suit; that upon sale being made, Rankin be ordered to pay the amount found due complainants; that upon failure of Rankin to comply with the order, and sell, the master in chancery make sale of so much of the lands as shall be necessary to pay the claims of complainants, with costs, and pay the amount due complainants, from the proceeds of the sale, and with alternative prayer for relief.

The defendants were properly brought before the court, and the defendant Rankin filed an answer, denying the truth, claiming the lands conveyed to him by Holmes in fee, and putting in issue the other material allegations of the bill.

Upon the hearing, an interlocutory decree was entered, finding the rights of the parties to be as alleged in the bill, and referring the cause to the master in chancery to take and report an account, etc. The master's report of an accounting finds that there is due the executors of John Swanwick, on their claim for principal and interest, to the first day of September, 1883, the sum of $6380; that there is due Barcroft & Co., on their claim for principal and interest, to the first of September, 1883, the sum of $12,960; that defendant Rankin has paid to John Swanwick, in his lifetime, with interest

computed to September 1, 1883, $993.10; that defendant Rankin has paid to Barcroft & Co., interest computed on the same to September 1, 1883, $8837.60; that defendant has paid taxes on the land, with interest to September 1, 1883, $1180.27, as follows:

Taxes for year 1872, paid Jan. 15, 1874, $252.81; interest on same nine years seven and a half months, at six per cent, $146.43, - - - -	$399.24
Year 1872, paid Jan. 15, 1874, $94.47; interest on same nine years seven and a half months, $36.28,	130.75
Year 1873, paid June 11, 1874, $177.78; interest on same nine years three months, $98.43, - -	276.21
Year 1874, paid May 26, 1875, $127.51; interest on same eight years four months, $63.50, - -	191.01
Year 1875, paid May 19, 1876, $127.18; interest on same seven years four months, $55.88, - -	183.06
Amount taxes paid to May, 1876, - - - -	$1180.27

The master then finds that Robert Rankin was, on the 19th day of November, 1873, declared a bankrupt, and that his assigns in bankruptcy sold all claims that Robert Rankin had against these lands, for interest, taxes, and $4000 time draft paid Barcroft & Co., on the 2d day of January, 1877, and one John D. Rankin became the purchaser of said claims, and assigned the same to Robert Rankin for the sum of $150, with interest on the same to September 1, 1883, ($59.25,) and proceeds: "I find there is due Robert Rankin on account of these claims, computing interest to September 1, 1883, $209.25. I also find due Robert Rankin for taxes paid on the lands from January 29, 1877, to 1883, with interest from date of payment, to September 1, 1883, $899.30." He also finds Rankin entitled to $75 per annum for six years' service as trustee, ($450,) and $300 for attorney's fees in this case, making the total amount allowed Rankin, $1858.55. He further finds that Rankin has collected rents amounting to $1467.03, which leaves a balance of $391.52 due Rankin.

Exceptions were filed to the master's report by both parties. The master disallowed them. They were renewed in the circuit court, and there again disallowed. Those by defendants were as follows: "That the master erred in proceeding until the defendant could be heard in the circuit court to have the decree vacated and expunged from the record; that the master erred in admitting time drafts payable to John Swanwick, because they are not liens or evidences of incumbrance on said land, but were created and brought into existence after the written agreement; because the master erred in admitting time drafts in favor of Barcroft & Co., over the objection of defendant, because they were not liens or incumbrances of any kind on said real estate, but were created after the date of said written agreement; because the master erred in refusing to pass upon the objection of complainant's solicitor to the taking into account the pay for services prior to the year 1876, the defendant being thereby debarred from his right of excepting to the master's ruling if adverse to his interest, and because by his final report he seems to tacitly have sustained and admitted this objection without defendant having an opportunity to except to his said action; because the master erred in finding that Robert Rankin was declared a bankrupt, and that his assignees had sold all claims that Robert Rankin had against these lands for interest, taxes, and $4000 paid Barcroft & Co., on the 27th day of January, 1877; because there was no evidence before the master from which he could find any such facts; because the only matter in the master's record and before the master was the complainant's objection, and no evidence whatever was before said master on which to sustain such finding; that the master erred in finding that John D. Rankin became the purchaser of the claims of Robert Rankin against said trust estate, and assigned the same to Robert Rankin for $150, and in finding that sum, with interest thereon, as the only sum due said Rankin; that there is no evidence before said master on which said finding could

be sustained; that there was no evidence introduced before said master relating to said matter, and because the defendant had a perfect right and legal authority to purchase at said assignee's sale, or from the purchaser at said sale, and as to the price he paid at said sale he occupies the relation of a stranger; because the assignee of said bankrupt never could have any interest in or control over the trust confided by said instruments in Robert Rankin; because the pretended decree under which the master was taking said account gave no direction to said master to make any such distinction, or to take into consideration any such proceedings in bankruptcy, and because the master's action is wholly unauthorized by said pretended decree, or by any evidence before him, as shown by his report of the evidence; because the master finds that prior to January 29, 1877, Rankin paid for taxes on said claims, etc., $11,010.97, and allows him for said sum only $209; because the master erred in omitting the amounts found to have been paid by defendant prior to January, 1877, and in omitting the amount due defendant for his personal services prior to said date; because, as shown by the master's report, there was no evidence to sustain said finding, in whole or in part; that the only evidence that said Rankin was discharged, is the certificate of discharge, showing that he was released from all debt existing prior to November 19, 1873, and that there are no data in any of said testimony on which said master can fix his assumption that January, 1877, was or could be of any importance whatever; that said assignee's sale was not a sale made by defendant Rankin as trustee, and his purchase was not a purchase of the trust property the dealing in which by the trustee is prohibited by public policy; because the master erred in not finding for defendant the amounts of his advances, making a total of $13,035.27, instead of the sum of $1858.55 which has been allowed in the conclusions of said master's findings; because evidence would justify the finding a credit of the sum of $13,035.27,

while there is a total absence of evidence to justify the finding of $1858.27."

The court decreed that the master's report be approved, and that so much of the lands described in the bill as should be necessary to pay the amounts so found due, be sold by the master in chancery. Upon this decree the defendant Rankin prosecuted a writ of error from the Appellate Court for the Fourth District, and that court, on hearing, affirmed the decree of the circuit court. The present writ of error is prosecuted to reverse that judgment.

Mr. J. PERRY JOHNSON, Mr. HENRY E. MILLS, and Mr. A. G. GORDON, for the plaintiff in error:

The administrator or executor of Albert W. Senter should have been made a party. *Lynch* v. *Rotan*, 39 Ill. 14; *Smith* v. *Rotan*, 44 id. 506; *Ryan* v. *Lynch*, 68 id. 160; *Stephenson* v. *Mathers*, 67 id. 123; *Moore* v. *Munn*, 69 id. 591; *Alexander* v. *Hoffman*, 70 id. 114; *Packwood* v. *Gridley*, 39 id. 388; *Hopkins* v. *Roseclare Lead Co.* 72 id. 377; *McGraw* v. *Bayard*, 96 id. 147; *Gudgel's Admr.* v. *Ketterman*, 108 id. 50; *Manufacturing Co.* v. *Wire Fence Co.* 109 id. 71.

The writing should, with reasonable certainty, show who the beneficiary is, and must so define his interest that a fraudulent party may not be substituted. The words, "existing incumbrances on said property," even in the light of the testimony, do not show who are the beneficiaries first secured. *Ricketson* v. *Ricketson*, 19 Cal. 330; *Booth* v. *Baun*, 9 Conn. 286; *Gilman* v. *Moody*, 43 N. H. 239; *Hunt* v. *Robinson*, 11 Ohio St. 232; *Gill* v. *Torney*, 12 id. 38; *Bramball* v. *Flood*, 41 Conn. 68; *Shaw* v. *Lord*, 12 Mass. 447.

The purchaser at an assignee's sale takes such interest as the bankrupt had prior to the proceedings in bankruptcy against him, and stands on the same footing with a purchaser at an execution sale. *Steadman* v. *Taylor*, 17 Bank. 284; *Carr* v. *Fearington*, 63 N. C. 560; *Anderson* v. *Miller*, 7 S. & M. 590.

The purchaser at a bankrupt sale takes no higher right than the bankrupt himself had. *Baker* v. *Vining*, 30 Me. 121.

Rankin had the right to purchase at the sale made by his assignee. *Phelps* v. *McDonald*, 2 McArthur, 380; *Arnold* v. *Leonard*, 12 S. & M. 258.

Personal assets do not vest immediately in the heir, but in the executor or administrator. 2 Blackstone's Com. 420, note 38; Williams on Executors, note 527; Story on Eq. Pl. sec. 170.

The manner in which the interlocutory decree was prepared is obnoxious to good chancery practice. *Stevens* v. *Coffee*, 39 Ill. 148; *Schneider* v. *Siebert*, 50 id. 285.

Mr. WILLIAM HARTZELL, and Mr. JAMES J. MORRISON, for the defendants in error:

It is competent for a party, after the legal title to real estate has been vested in him, to make a written declaration that he holds such title in trust for another. Parol evidence is competent to show whose name should have been inserted in a blank in a declaration of trust, as *cestui que trust*. *Fast* v. *McPherson*, 90 Ill. 497.

The want of proper parties can not be taken advantage of for the first time in the Supreme Court, unless it appears that parties are omitted whose rights are so connected with the subject matter of the suit that a final decision thereof can not be made without materially affecting their interests. *Conwell* v. *Watkins*, 71 Ill. 488.

A court of equity, independent of any agreement, would consider money advanced by a trustee, to purchase in an outstanding title, as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property until he has reimbursed the advancement. *King* v. *Cushman*, 41 Ill. 31.

Trustees and others sustaining a fiduciary and confidential relation can not deal on their own account with the thing or

the persons falling within the trust or relationship. *Dennis* v. *McCagg*, 32 Ill. 429.

A trustee, executor or assignee can not buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees and *cestui que trust* shall have all the advantage of such purchase. 1 Perry on Trusts, sec. 428.

In foreclosing a mortgage, where junior mortgagees and incumbrancers are parties defendant, a cross-bill is unnecessary unless some relief other than a foreclosure is sought. The foreclosure of the prior mortgage affords relief to all subsequent incumbrancers who are made parties, and have the right to participate in the distribution of the surplus. *Soles* v. *Sheppard*, 99 Ill. 616.

By the operation of the Bankrupt law the assignee becomes vested with all the property and rights that the bankrupt had at the time of the assignment. *Talcott* v. *Dudley*, 4 Scam. 435; *Vairin* v. *Edmonson*, 4 Gilm. 124; *Griswold* v. *McMillan*, 11 Ill. 590.

Where a decree is entitled as of a certain term of court, and is so certified in the record, this will be conclusive evidence that the decree was made in term time, and not in vacation, and the record can not be impeached. *Mason* v. *Patterson*, 74 Ill. 191.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The errors assigned will be considered under the points and in the order discussed in the argument of plaintiff in error.

In the written agreement of Rankin and Holmes it is recited that the property has been conveyed to Rankin upon these trusts, namely: "The property is to be subdivided and sold, or otherwise disposed of by Rankin, in such manner and quantities, on such terms, and at such times and prices, as he shall think best, and the funds and proceeds arising from

such disposition and sale of the said property shall be applied to the following purposes, to-wit: First, to the extinguishment and satisfaction of the existing incumbrances on said property, whether by way of mortgage or otherwise, amounting to some $16,000 at the date of these presents; secondly, to the payment of $30,000, on account of the running account current, to said Rankin from said Holmes; thirdly, to the payment and liquidation of a claim of the estate of Albert W. Senter against the said Holmes, provided said claim shall not exceed the sum of $10,000; and fourthly, the net balance of said proceeds, if any there be, after discharging the above incumbrances and debts, and paying the costs, interest, and expenses of executing this trust, shall be divided equally between the said Rankin and the said Holmes." The circuit court, in the interlocutory decree, found and decreed that the respective claims of Barcroft & Co. and the executors of John Swanwick were embraced in and composed the said sum of $16,000 declared in this agreement to be a first lien on the lands. Plaintiff in error contends that the evidence does not sustain this finding, and this is the first point made in his argument as a ground of reversal.

It may be conceded, as contended by counsel, that there is no evidence showing that these claims were such that they could be enforced by virtue of a vendor's lien, or that they were in judgment, or secured by mortgage on the land,—in short, that they were not, in fact, existing incumbrances on the land; still, there is no other indebtedness shown that could possibly have been intended, and no other incumbrances on the lands. No other creditors are claiming this $16,000 prior lien, and, from the terms of the agreement, the second and third preferences are only to be satisfied in the order stated. Neither of them can, upon any reasonable construction, be advanced and substituted for the first preference. But the evidence is full and complete that Holmes and Rankin intended the claims of Barcroft & Co. and John Swanwick to

be paid under this first clause. The claim of the former was then $12,000, and that of the latter $4000, making the total $16,000. In the most favorable view that can be taken for Rankin, the parties were simply mistaken in assuming that these claims were existing incumbrances on the lands; but in the absence of intervening rights of third parties this mistake was of no consequence. A court of equity would have rectified it on bill filed for that purpose by Barcroft & Co. and the executors of Swanwick. What a court of equity would compel them to do, they could, of course, do of their own volition. If there had been no attempt before to declare a trust, Rankin might have declared it by letter, or by any other instrument in writing, declaring that he had held the lands in trust. (Perry on Trusts, 1st ed. 83.) And the right to thus declare a trust in the first instance, necessarily implies the right to make certain and specific a trust theretofore attempted to be declared. (*Fast et al.* v. *McPherson*, 90 Ill. 497.) Rankin went into bankruptcy in 1873, and in the schedules and exhibits filed by him on that occasion he clearly and emphatically declared and swore that he held these lands in trust, *first*, for the payment of the claims of Barcroft & Co. and John Swanwick, under the agreement between him and Holmes, and afterwards as further provided by that agreement. And in letters to Barcroft & Co., of a prior date, he also distinctly and fully acknowledged the trust.

The next ground of reversal urged is, that the administrator or executor of Albert W. Senter was not made a party. This objection was urged for the first time in the Appellate Court. The unknown heirs at law of Albert W. Senter were made parties by publication, and to the sufficiency of the notice to them no objection is pointed out by counsel or perceived by the court. We may therefore assume that the heirs-at-law of Senter are properly before the court.

The preference in the third clause of the agreement between Holmes and Rankin is of a claim of the estate of Albert W.

Senter. Plainly, this assumes that Senter is dead, but does not attempt to declare whether the estate has been settled, or whether Senter died testate or intestate. The word "estate," as used, means simply that this claim is one to be collected and added to the mass of his estate,—or, in other words, that it constitutes part of his estate. The period of more than seven years having intervened between the execution of the instrument and the filing of the bill, we must presume the estate had been settled, and that this part of it had vested in the heirs-at-law, nothing appearing to the contrary. In equity the title is treated as being where, in good conscience, it ought to be, and we think to have made the present objection available, plaintiff in error should have urged it in the circuit court, and there affirmatively shown that the estate of Senter had not been settled. We are of opinion, under the circumstances, that the only interest to be protected under this third clause was that of the heirs-at-law of Senter, and that plaintiff in error will be amply protected by the decree in making payment to them.

The next objection taken to the decree is, that Rankin is not allowed sums paid by him before the filing of the bill to Barcroft & Co. and the executors of Swanwick, amounting to some $9830.70. If he were decreed to again pay this amount, the position would be tenable; but he is not. The decree only directs a payment of the balance found due on those claims. By the first clause of the agreement between Holmes and Rankin, we have seen Rankin accepted the trust of paying the claim of Barcroft & Co., then amounting to $12,000, and that of John Swanwick, then amounting to $4000. By his previous acceptances of the time drafts, Rankin became legally liable to pay these sums, and his acceptance of the trust made them payable before anything else, out of the proceeds of the sales of the lands. When, therefore, he had paid $9830.70 of the amount, he only owed that much less, and he was only obliged to sell less, by that amount,

of the lands conveyed to him in trust. But as to the residue of the indebtedness the trust still existed. The doctrine of subrogation could have no application, for his position is precisely that of a mortgagor paying part of his debt secured by the mortgage. It would be both unjust and absurd that by making a partial payment he could be preferred, as to the balance of the claim, over the mortgagee.

When Rankin went into bankruptcy, the debts due him, if any, on account of this trust, and his property rights in these lands, went to his assignee. His duties as trustee were unaffected by the proceeding. If any claims in favor of Rankin vested in his assignee upon his becoming bankrupt, which were prior liens upon these lands, which we very much doubt, it is quite obvious it still remained the duty of Rankin, as trustee, to pay off and remove them, and for doing that he would be entitled to precisely what he paid out. If he had a prior lien which passed to the assignee, he thereafter occupied towards it the relation of a stranger. It then stood as a debt to anyone else. No principle is better settled than that a court of equity will not permit a trustee to speculate in the subject of his trust. If he buy in outstanding claims, his purchase is treated as a payment only, and he is allowed just what he paid out. (Perry on Trusts, 1st ed. sec. 428.) But this is in conformity with the ruling below. We are satisfied that if there be any error in the accounting, it is in favor of Rankin, and not to his prejudice. It is, to our minds, very questionable whether he should, as against the defendants in error, have been allowed any compensation for his services.

Objection is urged that the interlocutory decree was not submitted to counsel for plaintiff in error, and that it was prepared in vacation. The interlocutory decree, we have before seen, was authorized by the evidence. It was in conformity with the minutes of the judge, and has since been approved and adopted by the final decree. Under these cir-

cumstances, it was not indispensable that it should have been submitted to opposite counsel for their approval, if, in any event, that would have been necessary.

The objection that no time was allowed to amend the cross-bill, is destitute of merit.

The demurrer to the cross-bill was properly sustained. No case was stated showing any ground of affirmative relief on behalf of the plaintiff in error. It does not appear that leave to amend the cross-bill was asked, or that any amendment could have been made thereto, consistent with the facts as proved on the hearing, which would have removed the objection to it.

The errors assigned raise other points, but inasmuch as nothing is said in argument in their support, we are authorized to assume that they are abandoned.

We have gone through the entire record with much care, and we feel thoroughly satisfied that there is no reason for reversing the decree of the circuit court. It favors the plaintiff in error at least so far as he has a right to claim that it should. It does him no substantial injustice.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

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114 457
74a 537

THOMAS S. RIDGEWAY

v.

GEORGE H. POTTER.

Filed at Mt. Vernon September 25, 1885.

1. PRINCIPAL AND SURETY—*right of the latter to require indemnity or further security from the former.* A surety of a trustee can not maintain a bill in equity to require his principal to give other and additional securities upon his bond given to secure the *cestuis que trust*, or counter security, and on his failure to give such security, have him removed.

2. The contract created by law between a principal and surety is, that the former shall refund to the latter whatever the surety has to pay for him. The principal is under no legal duty to a surety to keep his co-sureties in equal solvency as they were when they first became such, or to keep any co-sureties to share in the liability.

3. Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the principal to discharge the debt for which the surety is responsible; and it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal.

4. TRUSTEE—*who may require an accounting by him—right of a surety.* On bill by a surety on the bond of a trustee, against the trustee, to compel him to render to the court a report of his acts, including his receipts and disbursements, or his debits and credits, where the *cestuis que trust* are not made parties, there is no error in the court refusing to pass upon the report and state the account, as such a statement of the account would not conclude them.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Gallatin county; the Hon. THOMAS S. CASEY, Judge, presiding.

Mr. A. D. DUFF, and Messrs. GREEN & GILBERT, for the appellant.

Mr. E. D. YOUNGBLOOD, and Mr. JAMES M. GREGG, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The bill in equity in this case, filed by Thomas S. Ridgeway, complainant, to the September term, 1882, of the Gallatin circuit court, sets out that by a certain instrument in writing, bearing date November 2, 1871, signed by the proper parties, one-half of the estate of one Orval Pool, then lately deceased, was created a trust fund, the interest and other increase of which were for the benefit of certain persons therein named, during their natural lives, and at their death the remainder was to vest absolutely in their respective heirs; that this in-

strument provided for the appointment of a trustee to receive this trust fund and manage the same, and execute and carry out the provisions of said trust, and that the trustee should enter into a good and sufficient bond, to be approved by the judge of the circuit court of Gallatin county, for the faithful performance of his duty as such trustee; that on December 26, 1871, George H. Potter, the defendant, was, as provided in said instrument, appointed such trustee by the judge of the circuit court of Gallatin county, and on May 15, 1872, the trustee made his bond as such, in the penal sum of $400,000, with H. O. Docker, David Reid, Robert Reid, J. McKee Peeples, J. McKee Peeples, Jr., and Thomas S. Ridgeway, complainant, sureties, all of whom were then solvent, which bond was approved by such judge; that defendant, since the execution of said bond, has received as such trustee over $100,000, but has never rendered any account thereof to any court or person, nor made any report showing the amount so received or the disposition and management thereof by him; that on December 22, 1879, J. McKee Peeples, Sr., departed this life testate; that his estate is nearly all distributed among his devisees and legatees, and is in process of final settlement and closing up; that all of the surviving sureties on the bond, except complainant, are now wholly insolvent, and that the trustee himself is in limited circumstances as to pecuniary means. The bill asks that the trustee be required, under oath, to answer, and render a full and complete report and account of his actings and doings as such trustee, and if it shall appear that there has been improper management of the trust fund, that the trustee be removed from his trusteeship, and another person be appointed in his stead; and also that if the trustee retains his position, he be required to give other and additional securities upon said bond, or an additional bond, and on failure to do so, that the trustee be removed, and another one appointed in his place, with a prayer for general relief. Defendant filed his answer under oath,

as required by the bill, making a full report as trustee, an exhibit, and part of the answer. No exception was taken to the answer. The cause was referred to the master to take proofs, who only took two depositions as to the insolvency of the sureties. Upon hearing on the foregoing, alone, the court dismissed the bill. On appeal to the Appellate Court for the Fourth District, the decree was affirmed, and the complainant appealed to this court.

It is insisted that it was error in the circuit court not to pass upon the report of the trustee, and approve or disapprove it; but to what end, and for what use, should the court have done so? The beneficiaries of the trust were not before the court, and they would not be bound by any action of the court on the report. The parties to this suit, the surety of the trustee and the trustee, were interested together, on one side of the account, that it should be in favor of the trustee, and an *ex parte* proceeding between them, in the absence of the parties interested on the other side of the account, to take and state the trustee's account, would seem to be idle. Were the persons beneficially interested in the trust property before the court, so that they would be bound by the result of the accounting, and it be conclusive against them and in favor of the surety in any action by the former upon the trustee's bond, then the propriety of this complainant, who is but a mere surety for the trustee, asking for a settlement of the account before the court, might with more reason be urged.

As respects the other relief asked, the giving of additional security, abundant authority is cited to the effect that courts of equity always exercise control over trustees in the administration of their trusts; that if trust funds become endangered by the financial failure of the trustee, a court of equity will protect them, and will always see that trust estates are not exposed to danger or loss; and it is said, that by the express terms of the instrument creating this trust fund, the trustee is required to execute a good and sufficient bond, which means

that during the time he acts as trustee he shall keep and maintain a good and sufficient bond. All this is very well, and would be quite apposite were the beneficiaries of this trust fund the parties here complaining; but the persons for whose benefit this bond was given make no complaint that it is not good and sufficient, but, for aught that appears, are content therewith as it is. The bond was not given for the benefit of the complainant, and he has no cause of complaint that it is not good and sufficient for the protection of the trust estate. He has no interst in the property the bond was given to protect. There is no pretence, from any allegation in the bill, that the bond is not now amply good and sufficient. The complainant is making demand for further security in his own interest, in order that he may have others to share with him his responsibility on the bond, or that he may get relieved from further liability. He is entitled to complain only in respect of some duty which is owing to himself, and not for any failure of duty toward others,—the beneficiaries of this trust fund.

The contract which arose between the trustee and complainant, from the relation of principal and surety, was, that the former would refund to the latter whatever the surety had to pay for the principal; but the principal came under no such duty that he would keep the co-sureties on the bond in equal solvency as they were at the time they executed the bond, or that he would keep any co-sureties on the bond to share with complainant his suretyship. Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the debtor to discharge the debt for which the surety is responsible. And it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal. (1 Story's Eq. Jur. sec. 327.) But we have been referred to no precedent for the maintenance by a

surety of a bill of like character with the present, and we know of no principle of equity under which such a bill is to be sustained. Our statutes have to a certain extent provided for the release of sureties upon bonds which they have executed,—as, when a surety upon the official bond of a public officer desires to be released from such bond, after the taking of certain steps on the surety's part to that end, if the officer fails to give a new bond, his office is made vacant. (Rev. Stat. 1874, p. 720, sec. 10.) And so there is provision that any surety on the bond of any guardian, conservator of any idiot or insane person, or the trustee of any fund or property, appointed by any court, may, by petition in court, compel such guardian, conservator or trustee to appear and settle his accounts, and file a new bond. (Laws 1877, p. 142.) But it has been decided that this statute did not embrace the case of this particular bond. *Potter* v. *Peeples et al.* 92 Ill. 430.

We can see that it is a hardship for the complainant to stand as the sole solvent surety on such a bond, where there is no express requirement for any accounting and settlement of accounts, subject to an unknown and indefinite liability, and that it would be very desirable on his part to have afforded to him the relief provided by this latter statute, and as asked for by his present bill; but we do not see how it can be done, aside from the aid of any statutory provision in such behalf.

The decree of the Appellate Court must be affirmed.

Decree affirmed.

Mr. CHIEF JUSTICE MULKEY took no part in the consideration of this case.

Syllabus.

THE COVENANT MUTUAL BENEFIT ASSOCIATION OF ILLINOIS

v.

MARGARET SPIES *et al.*

Filed at Mt. Vernon September 25, 1885.

114 463
26a 232
114 463
54a 77
58a 379
114 463
75a 88
114 468
105a 474
114 463
204 530
106a 1426

1. LIFE INSURANCE—*mutual benefit association—tender of annual and special assessments—notice.* The certificate of membership in a mutual benefit association required the holder to pay an annual assessment of three dollars on or before a certain day in each year, and in and by which the member agreed to pay, on the death of every member, an assessment, never to exceed one dollar and twenty cents, and provided further, that if the said annual and special assessments, etc., should not be received by the association within thirty days from date of the notice, the certificate should be null and void: *Held*, in the absence of a notice, no tender of the amount of such assessments was necessary in order to prevent a forfeiture of membership. Under such certificate, the holder of the certificate would be entitled to notice of the annual assessment before he could be in default for its non-payment.

2. SAME—*proof of death before suit brought—waiver in respect thereto.* In a suit upon a certificate of membership providing for the payment of a given sum to the widow and heirs of the member upon his death, the association issuing the same may waive proof of the death before suit brought.

3. So where a by-law of a mutual benefit association provided that upon receipt of notice of the death of a member the secretary should immediately forward to the representatives of the deceased the proper blanks, and full instructions how to make proofs of death, and the association, upon notice of the death of a member, with a request to send the blanks and instructions as to the required proof, failed to send the same, on the claim that the deceased had forfeited his rights and his certificate had been cancelled, and refused payment of the sum named therein on that ground alone, it was *held*, that this was a waiver of the preliminary proof of death.

4. SAME—*by-laws of the association, as entering into the contract of insurance.* The by-laws of an association for mutual benefit, in the nature of life insurance, are binding upon it and all its members, and its contract for the payment of money to the widow and heirs of a deceased member is to be considered and construed with reference to its powers and duties as fixed by its charter, and by-laws pursuant thereto; and such widow and heirs have the right to rely on the performance of such by-laws.

5. EVIDENCE—*when its admission no error.* There is no error in permitting a party to prove a fact not disputed, or to prove the same fact twice, where it works the other party no injury.

APPEAL from the Appellate Court for the Fourth District; —heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

MESSRS. MCKENZIE & CALKINS, for the appellant:

No one can recover under a contract by which he is required to do any act, until he has performed or offered to perform. *Schwartz* v. *Saunders*, 46 Ill. 18; *Dehler* v. *Held*, 50 id. 491; *Taylor* v. *Beek*, 13 id. 376; *Baird* v. *Evans*, 20 id. 29; *Lyon* v. *Culbertson*, 83 id. 33; Moore on Civil Justice, sec. 244.

A covenant or promise is dependent upon all those covenants or promises to be performed in point of time. *Dunne* v. *Moore*, 16 Ill. 152; *Davis* v. *Wiley*, 3 S. C. 234; *Hoy* v. *Hoy*, 44 Ill. 469.

Demand is unnecessary when the party owing the debt or duty has means of knowing when it becomes due, as well as the opposite party. *Morford* v. *Mastin*, 6 T. B. Mon. 609.

The annual dues for expenses were by contract—not by notice. No notice is necessary to be given to defendant of the happening of a contingency, if by the contract he has provided himself with the means of ascertaining the fact. *Kies* v. *Powell*, 2 A. K. Marsh. 254; *McKee* v. *Beall*, 3 Litt. 190.

The court erred in admitting the by-laws in evidence. The by-laws are not referred to either in the application or certificate. In order to have them taken and considered as part of the contract, they must be referred to, and by terms made a part thereof,—and this is the rule even though they be printed upon the back of the policy. *Philbrook* v. *Fire Ins. Co.* 37 Me. 137; *Marshall* v. *Fire Ins. Co.* 27 N. H. 157; *Mutual Benefit Association* v. *Miller*, 39 Ind. 475; *Life Ins. Co.* v. *Robertson*, 59 Ill. 126.

It was incompetent because it had nothing to do with the contract.

Mr. WILLIAM C. KUEFFNER, for the appellees:

A member of a mutual society can not be expelled except upon charges, and notice, so as to have an opportunity to be heard. *Commonwealth* v. *Benefit Association*, 24 How. Pr. 221; *People* v. *Benefit Society*, 6 Thomp. & Cook, 88; *Palferd* v. *Fire Department*, 31 Mich. 461; *Fritz* v. *Muck*, 62 How. Pr. 74; *Wood* v. *Wood*, Exch. L. R. 198; *Blissett* v. *Daniel*, 10 How. 538.

A tender is waived by acts or declarations of a party showing it would not be received, or by denying liability. *Mattocks* v. *Young*, 66 Me. 459; *Hanna* v. *Ratikin*, 43 Ill. 464; *Wyncoop* v. *Cowing*, 21 id. 588.

The conduct of appellant was a waiver of proof of death. Refusal to pay was placed on other grounds. May on Insurance, sec. 469; Bliss on Life Insurance, sec. 267.

When a party takes out a policy in a mutual life insurance company, he is bound by its rules. *Life Ins. Co.* v. *Foote*, 79 Ill. 362.

Proof of loss must be made in accordance with the by-laws. *Woodfin* v. *Asheville Co.* 6 Jones, (N. C.) 558.

The by-laws of a company are binding upon its members and officers. *Wash* v. *Johnson*, 95 Ill. 248; Angell & Ames on Corp. 359.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was assumpsit, brought in the circuit court of St. Clair county, by the widow and children of Charles Spies, deceased, on a certificate of membership in the Covenant Mutual Benefit Association of Illinois, whereby that association promised to pay them $5000 upon the death of Charles Spies, subject to certain stipulated conditions. The defence interposed upon the trial in the circuit court was, that the certificate of membership was cancelled by the association on the 5th day of December, 1882, because of the violation by the said Charles

of a clause therein, whereby it was provided that if he should, at any time after the certificate was issued, use alcoholic stimulants so as to seriously impair his health, the certificate should become null and void. The jury found the issues for the plaintiffs, and assessed their damages at the amount named in the certificate. The court, after overruling a motion for a new trial, rendered judgment upon the verdict, and that judgment was affirmed, on appeal, by the Appellate Court for the Fourth District.

The principal controversy in the circuit and Appellate courts was on the question of fact, and that being finally settled against appellant, there are left for our determination but three questions, neither of which is of difficult solution, nor demands extended discussion.

First—It is contended that the court erred in refusing to give the ninth instruction asked by the defendants, which was as follows:

"You are further instructed, that if you shall be satisfied, from the evidence, that the contract sued on required the annual payment of three dollars, membership fee, on or before September of each year, and that Charles Spies knew of the requirement, then, if the jury shall believe, from a preponderance of the evidence, that Spies did not pay the membership fee for 1883, and made no tender of the money to defendant, or, having made tender of it, failed to keep the tender good by bringing the money into court, then the want of such payment or tender would not continue him a member of the defendant's association."

The certificate of membership contains a clause, marked "1," requiring the payment of an annual assessment of three dollars on or before the first day of September, and whereby the assured "further agrees to pay, on the death of every member of this association, an assessment, never to exceed one dollar and twenty cents," etc. And the next clause in the

certificate, which is numbered 2, is as follows: "The holder of this certificate further agrees, that if the said annual or special assessments and collection of costs are not received by the association within thirty days from date of notice, then this certificate of membership shall be null and void, and of no effect." Very clearly, the effect of this was to entitle the holder of the certificate to notice of the annual assessment before a default would occur for its non-payment. It was competent for the contracting parties to fix their own terms in this respect, and, having fixed them, they must abide by them. Thirty days after the date of the notice, but not until then, the parties have contracted, if the money is not paid, the certificate shall be void. There was, therefore, no obligation to make a tender, in the absence of a notice, for the purpose of preventing a forfeiture, and the instruction was properly refused.

Counsel for appellant, in their argument, concede that the non-payment of the three dollars did not render the certificate void, but they insist that the payment is a condition precedent, which Spies or his legal representatives, or those claiming rights under his contract, were bound to perform or to offer to perform before he or they could ask performance upon the part of the appellant. This is a concession that the court properly refused the ninth instruction as asked. The proposition contended for was not ruled upon by the court, and it is for that reason impossible that any error can be assigned in regard to it. It is not before us, and we do not express any opinion upon it. Evidence in regard to a tender of this three dollars was before the jury, and no specific erroneous ruling of law in that respect being pointed out, we can not presume error.

Second—An objection is urged that the circuit court erred in permitting appellees' counsel to call appellant's secretary to the witness stand on two different occasions, and to be interrogated as to whether he had specially sent Spies notice

of his annual dues. Inasmuch as it is not pretended that such notice was sent, and that we hold, in the absence of such notice, the certificate could not be annulled for the non-payment of the amount, it is evident appellant was not prejudiced by this ruling. Proving the same thing twice, when the first proof is complete and distinctly understood, is a useless waste of time; but it is not perceived, nor satisfactorily shown, how such useless proof could improperly affect some other question.

Third—The only other objection raising a question of law is, that the court erred in admitting in evidence a by-law of appellant, as follows: "Upon receipt of notice of the death of a member of the association, the secretary shall immediately forward to the representatives of the deceased the proper blanks, and full instructions how to make proofs of death." The objection assumes that the question of the death of Spies was contested, and the *onus* of proof on appellees. Primarily, the burden is, undoubtedly, on the plaintiffs, in such cases, to prove the death; but that proof may be waived. The record here shows that appellant was notified of the death of Spies, and requested to send instructions as to the proof required of that fact, and that appellant thereupon, instead of sending the requested instructions, set up the claim that Spies was not a member of the association at the time of his death, and that the certificate had been cancelled,—and this claim has ever since been consistently adhered to throughout the litigation. This was a waiver of the proof of death. *Grattan* v. *Metropolitan Life Ins. Co.* 80 N. Y. 281; May on Insurance, sec. 469.

We incline to the opinion that the evidence, if proof of that which it was introduced to establish had not been waived, was admissible. Spies was a member of the association. The by-laws were binding upon the association and all its members, and the contract was made with reference to the powers and duties of the association, as fixed by its charter,

and its by-laws pursuant thereto. The widow and children of Spies had a right to assume and rely on the performance of the by-law. See *Protection Life Ins. Co.* v. *Foote*, 79 Ill. 362; *Woodfin* v. *Asheville, etc. Co.* 6 Jones, (N. C.) 558.

Perceiving no error of law in the rulings below, the judgment must be affirmed.

Judgment affirmed.

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114 469
126 273
126 549
114 469
34a 36
114 469
o198 829
o198 389
114 469
105a 444

BERNARD A. ECKHART *et al.*

v.

AGNES F. IRONS *et al.*

Filed at Ottawa September 22, 1885.

APPEAL—*whether a freehold is involved.* A bill in chancery to enjoin an owner of a city lot from erecting a building upon a strip of ground along the front of the lot, reserved in the deed by the grantor as an easement, involves no question of freehold, and no appeal lies directly to this court from the final decree of the circuit court. Such a strip amounts, at most, only to an easement.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This was a bill in chancery, brought by Bernard A. Eckhart and others, against Agnes F. Irons and others, to enjoin her from erecting tenement buildings upon a strip of land along the lot, reserved and set apart as a court-yard, they claiming that such strip is an easement. The court, on the hearing, dismissed the bill, and complainants prosecuted an appeal directly to this court.

Messrs. HOLDEN & FARSON, and Messrs. ABBOTT, OLIVER & SHOWALTER, for the appellants.

Mr. H. F. WHITE, for the appellees.

Per CURIAM: This appeal must be dismissed. It comes directly from the circuit court of Cook county to this court, upon the hypothesis, we presume, that it involves a freehold. This is a misapprehension. Conceding all that appellants claim in respect to the strip of land in question, it amounts to an easement, only, and we have repeatedly held this does not constitute a freehold.

The appeal will be dismissed, with leave to appellants to withdraw the record, abstracts and briefs, if they shall desire to do so.

Appeal dismissed.

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114 470
26a 415
114 470
39a 513
114 470
161 40
50a 107
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JOHN UTTER *et al.*

v.

E. S. JAFFRAY & Co.

Filed at Mt. Vernon September 25, 1885.

1. PRACTICE—*how to avail of error in the ruling of the trial court—by exception, motion in arrest, or for a new trial.* Where the *ad damnum* laid in the original declaration was $3000, but in the amended declaration it was laid at $1000, and the affidavit to hold to bail stated the indebtedness to be $2578.75, for which sum the court assessed the plaintiff's damages and rendered judgment, there being no exception taken, and no motion made in arrest or for a new trial, it was *held*, that as the error might have been obviated by amendment, if pointed out and insisted upon in the trial court, it afforded no ground of reversal.

2. Where a cause is tried by the court without a jury, if the court assesses the plaintiff's damages in excess of the *ad damnum* in the declaration, the defendant must except to the finding, or take advantage of the error by motion in arrest or for a new trial in the trial court, before he can make the objection in an appellate court.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit court of Fayette county; the Hon. JESSE J. PHILLIPS, Judge, presiding.

This was an action on the case, commenced in the circuit court of Fayette county, by the firm of E. S. Jaffray & Co., against John Utter and George W. Utter. The damages laid in the orginal declaration were $3000. In the amended declaration they were laid at $1000. On the pleas filed by the defendants, a trial was had before the court, without a jury. The court found the defendants guilty as charged in the second count of the amended declaration, and assessed the plaintiff's damages at the sum of $257S.75, and rendered judgment against the defendants for that sum. That judgment was affirmed in the Appellate Court for the Fourth District, and the defendants bring the cause to this court on error.

Messrs. BELL & GREEN, for the plaintiffs in error:

The principle is elementary that a plaintiff can recover no greater amount of damages than the amount stated in the *ad damnum* of his declaration; and where the judgment is for more damages than are laid in the *ad damnum*, it will be reversed on writ of error. *Oakes* v. *Ward*, 19 Ill. 46; *Kelley* v. *National Bank*, 64 id. 541; *Brown* v. *Smith*, 24 id. 196; *Altes* v. *Hinckler*, 36 id. 275; *Walcott* v. *Holcomb*, 24 id. 331; *Rives* v. *Kumler*, 27 id. 291; *Linder* v. *Monroe*, 33 id. 388; *Pierson* v. *Finney*, 37 id. 29.

After the close of the term at which a judgment is rendered, the record can only be amended in matters of form and not in matters of substance. *O'Conner* v. *Mullen*, 11 Ill. 57; *Coughran* v. *Gutchens*, 18 id. 390; *Cook* v. *Wood*, 24 id. 295; *Goucher* v. *Patterson*, 94 id. 525.

The amendment allowed by the Appellate Court was in matter of substance, and not of form. *Brown* v. *Smith*, 24 Ill. 196.

The rule in regard to amendments announced in the above cases, has not been changed by any statutory provision, as section 23, chapter 110, of the Revised Statutes, only provides for amendments before final judgment.

Messrs. ASHCRAFT & STILLMAN, for the defendants in error:

Where an objection is such as to be obviated by amendment, if seasonably made in the court below, and is not urged below, it can not be taken advantage of for the first time in this court. *Bowden* v. *Bowden*, 75 Ill. 111; *Railroad Co.* v. *Estes*, 96 id. 473; *Tug Boat* v. *Waldron*, 62 id. 221; *Zeigler* v. *Cox*, 63 id. 48; *Thompson* v. *Hoagland*, 65 id. 310; *Pugh* v. *Calloway*, 10 Ohio St. 488; *Rivereau* v. *St. Ament*, 3 Iowa, 118; *Crosson* v. *White*, 19 id. 109; *Hayeshill* v. *Cronin*, 4 Allen, 141; *Robinson* v. *English*, 34 Pa St. 324.

In *Parsons* v. *Evans*, 17 Ill. 338, a case tried by the court, this court said: "The statute gives the right in such case to assign error only where the decision assigned for error was excepted to, and we have no right to dispense with this requisition." To the same effect are *Duncan* v. *Chandler*, 5 Bradw. 499; *Fire Ins. Co.* v. *City of Paris*, 8 id. 181; *Sherman* v. *Skinner*, 83 Ill. 584; *Manufacturing Co.* v. *Horton*, 74 id. 310; *Dickhut* v. *Durrell*, 11 id. 72; *Gibbons* v. *Johnson*, 3 Scam. 63; *Richwald* v. *Gaylord*, 73 Ill. 503.

The rule announced by the decisions cited by counsel for plaintiffs in error has been materially modified by subsequent legislative enactments and later decisions of our courts. *Thompson* v. *Sornberger*, 78 Ill. 353; *Tomlinson* v. *Earnshaw*, 112 id. 311.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

Only two errors are assigned on the record in this cause: First, the Appellate Court erred in sustaining the motion to amend the declaration; and second, in affirming the judgment of the circuit court.

As respects the first error assigned, it is sufficient to say, as the record shows was the fact, the Appellate Court did not sustain the motion to amend the declaration, but refused it.

In support of the second error assigned, it is suggested the judgment in the circuit court was for a larger sum than the

ad damnum in the amended declaration filed by plaintiffs, on leave given by the circuit court for that purpose,—and that, it is said, was error, for which the Appellate Court should have reversed the judgment of the circuit court. A certified copy of the original declaration filed, on leave given, in the Appellate Court, shows the *ad damnum* was $3000. That is a sum larger than the judgment rendered. It further appears in the affidavit filed for a *capias*, plaintiffs claimed defendants were indebted to them in the sum of $2578.75, and in the writ issued, the sheriff, on arresting defendants, was directed to take bail in the sum of $3000, with sureties. In that way defendants were put on notice of what plaintiffs claimed, and for that reason could not be, and were not, taken by surprise when the court rendered judgment against them for the sum it did. But waiving this view, it is fatal to the position now insisted upon by defendants, that they took no exceptions in the trial court to the judgment rendered against them. No motion for a new trial or in arrest of judgment was made, nor did defendants save any exception to the decision of the court. Had they done so by motion for a new trial, or in arrest of judgment, or by any exception to the decision of the court, stating that the finding of the damages was in excess of the *ad damnum* in the amended declaration, the error could have been, and no doubt would have been, corrected at once, under the statute, on such terms as the court might have deemed equitable and just. But nothing of the kind was done. In *Parsons* v. *Evans*, 17 Ill. 238, it was held, unless the decision was excepted to, and that exception saved by a bill of exceptions, error could not be assigned on the finding of the court on the evidence. The doctrine of that case has been followed in many subsequent cases, and in the recent case of *James* v. *Dexter*, 112 Ill. 489, where the cases are cited.

This view is conclusive as to the questions made, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiff in Error.

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JOHN B. BOWMAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon September 25, 1885.

1. PLEADING—*of the declaration—in personal action to recover taxes.* In an action of debt, to recover taxes due upon lands forfeited to the State, it is essential that the declaration allege the fact, not only that the defendant was the owner of the real estate against which the delinquent taxes are charged, but also the further substantive fact that he was such owner at the time such taxes became a charge against the real estate. A failure to allege these facts affords grounds for arresting the judgment.

2. AMENDMENTS AND JEOFAILS—*defects in pleading cured after verdict.* If a declaration omits to allege any substantive fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. FRANK B. BOWMAN, for the plaintiff in error:

The declaration discloses no cause of action, and for that the judgment can not stand.

The statute which authorizes the bringing of a suit as that at bar, provides, among other things, that "the owner of property on the first day of May in any year shall be liable for the taxes of that year." This proviso by implication excludes the idea of a personal action against any person other than such owner. *Biggins* v. *People*, 96 Ill. 383.

The right to have and maintain an action under the statute is limited to such owners, and if the declaration omits to allege that the defendant was the owner on May 1, etc., it totally fails to set out a cause of action. *People* v. *Winkelman*, 95 Ill. 412; *Biggins* v. *People*, 96 id. 383; *Williams* v. *Hingham*, 4 Pick. 341.

An omission to state or disclose a cause of action in the declaration is not cured by a verdict. *Insurance Co.* v. *Bank*, 61 Ill. 482; *Coal Co.* v. *Long*, 91 id. 921; *King* v. *Sea*, 6 Bradw. 191; *Bartlett* v. *Crozier*, 17 Johns. 439; *Williams* v. *Hingham*, 4 Pick. 341.

If a declaration does not disclose a cause of action, that error may be taken advantage of on a motion in arrest, or on error. *Wilson* v. *Myrick*, 26 Ill. 35; *Haynes* v. *Lucas*, 50 id. 439; *Kipp* v. *Lichtenstein*, 79 id. 361.

Mr. GEORGE HUNT, Attorney General, and Mr. R. E. HOLDER, for the People:

Plaintiff in error in his brief makes no distinction between a declaration in which a cause of action is defectively stated, and one which discloses no cause of action.

Section 230 of the Revenue act, under which this suit was brought, does not limit the action to any particular class of persons. It is only necessary, in bringing a suit under that section, to allege that the defendant is the owner of the property taxed. This the declaration in the case at bar does. The limitation of a personal liability for taxes on real estate is contained in another section, viz., section 59, which limits the liability to the owner on the first day of May, etc.; and applying the rule of law laid down in the above case of *Williams* v. *Hingham*, we must conclude that when the plaintiff, as in the case at bar, has alleged ownership in the defendant, the *onus* is upon the defendant to plead any limitation to his liability.

In the case of *King* v. *Lea*, 6 Bradw. 191, the declaration disclosed on its face, facts which were subversive of the cause of action. In his opinion in said case, Judge McAllister says: "The principle on which such intendments, in some cases, will be regarded as curing defects in the declaration after verdict, is this: Where there is any defect, imperfection or omission in any pleading, in substance or form, which would

have been a fatal defect upon demurrer, yet if the issue joined be such as is necessarily required at the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." 1 Chitty's Pleading, 673.

The statute on amendments and jeofails, (Rev. Stat. 1874, chap. 7, sec. 6,) provides that judgment shall not be arrested or stayed after verdict, etc., (clause 5,) for any mispleading, insufficient pleading, etc. "For the want of any allegation or averment on account of which omission a special demurrer could have been maintained." (Clause 9.)

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is an action of debt. The declaration contains but one count, of which the following is a copy:

"For that the said defendant heretofore, to-wit, on the 15th day of December, A. D. 1879, was and still is indebted to the plaintiff in the sum of $2307.90, for and on account of divers amounts of taxes, interest, penalties and costs due and unpaid, against divers tracts, pieces, parcels and lots of land of said defendant, situated in said county, and before said day forfeited to the State of Illinois, for non-payment of said taxes, interest, penalties and costs, which said real estate, together with the amounts for which the same was forfeited, as aforesaid, is as follows, to-wit: (Here the property is described.) Wherefore, and by force of the statute in such case made and provided, an action hath accrued to the plaintiff to have and demand of and from the said defendant the said several amounts of money, the same being, in the aggregate, the said sum of $2307.90, first above mentioned; yet the defendant, though requested, hath not paid the said several sums of money, nor any nor either of them, nor any part

thereof, but fails and refuses so to do, to the damage of plaintiff of $2307.90, wherefore they sue," etc.

The defendant pleaded *nil debet*. By agreement of parties the cause was tried by the court, without the intervention of a jury. The court found that the defendant was indebted to the plaintiff in the sum of $2016.59. Motions for a new trial and in arrest of judgment were made by the defendant, and overruled by the court, and the court thereupon rendered judgment for the sum so found to be due.

The rule is, if the declaration omits to allege any substantial fact which is essential to a right of action, and which is not *implied in* or *inferable from* the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. (Gould's Pleading, chap. 10, sec. 22.) Chitty, in his work on Pleadings, (vol. 1, 7th Am. ed. 712, *713,) says: "The expression, *cured by verdict*, signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings, was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict, and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved must always be such as can be implied *from the allegations in the record, by fair and reasonable intendment;* and on the other hand, a verdict for the party in whose favor such intendment is made is indispensably necessary," etc. It was essential to allege in the declaration the substantial fact not only that the defendant was the owner of the real estate against which the delinquent taxes are charged, but also the further substantial fact that he was such owner at the date such taxes became a charge against the real estate. (*People* v. *Winkelman*, 95 Ill. 412; *Biggins* v. *People*, 96 id. 383.) It can not be implied that the defendant was the owner of these lands at the time the taxes alleged became a charge against them, since they were

at all times liable to be transferred by alienation, pursuant to voluntary and forced sales, and, therefore, title may have many times changed since that occurred. The mere fact of ownership creates no personal liability for the taxes due on the property, by the rules of the common law; and the statutory liability can not be extended to cases beyond its plain letter and spirit. The liability imposed by statute is not because of present ownership, but because of the failure of the individual to perform a statutory duty,—that of paying taxes on property owned by him on the first day of May. *People* v. *Davis*, 112 Ill. 272.

We think the declaration was clearly bad, and that its defect was not cured by the verdict, and, consequently, we must hold, as we do, that the court below erred in not arresting the judgment.

The judgment below is reversed, and the cause remanded to the circuit court, with direction to that court to arrest the judgment.

Judgment reversed.

Mr. JUSTICE SHELDON: The declaration was doubtless bad upon demurrer, but after pleading the general issue and consenting to go into a trial upon the merits under such a declaration, I do not think the defendant should now be heard to object to the sufficiency of the declaration, but that the verdict should be allowed to stand.

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THE CITY OF CHICAGO

v.

FRED S. JAMES.

Filed at Ottawa September 21, 1885.

1. FOREIGN INSURANCE COMPANIES—*tax or license by cities and villages—under acts of 1872 and 1879.* Section 110 of the act 1872, in relation to cities and villages, requiring foreign insurance companies to pay to the treasurer of the city or village two dollars on the $100 of the net receipts of their agency in such city or village, is repealed by section 30 of chapter 73, passed in 1879, and no action lies against such companies or their agent under the act of 1872.

2. The tax or license mentioned in the proviso to section 30 of chapter 73, passed in 1879, requires affirmative action by the city or village that may be entitled to it, in fixing the rate, which must not exceed two per cent of the gross instead of the net receipts of the agency.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

Mr. JULIUS S. GRINNELL, for the appellant.

Messrs. PADDOCK & ALDIS, and Mr. GEORGE C. IDE, for the appellee.

Mr. JUSTICE TUNNICLIFF delivered the opinion of the Court:

The city of Chicago, in 1875, organized under the act of 1872, in relation to the incorporation of cities, etc., (Rev. Stat. chap. 24,) and brought this action in debt, against appellee, to recover the two per cent upon the net receipts of several foreign insurance companies doing business through him, as their agent, in Chicago, as provided for in section 110 of that act. The declaration was demurred to, and the demurrer was sustained by the circuit court, and the city electing to abide by the declaration, appealed the case to the Appellate Court

for the First District, where the judgment below was affirmed, and to reverse which it has further appealed to this court.

Said section 110 enacts, in terms, that "all corporations, companies or associations not incorporated under the laws of this State, engaged in any city in effecting fire insurance, shall pay to the treasurer the sum of two dollars upon the $100 of the net receipts by their agency in such city, and at that rate upon the amount of all premiums which, during the half year ending on every first day of July and January, shall have been received for any insurance effected or agreed to be effected in the city or village by or with such corporations, companies or associations, respectively." The section required reports to be made, on or before the 15th day of July and January of each year, of the amounts so received, and that the agents of the companies should, at the time of making the reports, pay to the city treasurer the amount of rates to which it was entitled; prohibited the companies from doing business if default was made in these payments, and authorized suit to be brought to recover the amount coming to it, in the name of the city, against the company or its agent, and contained a provision that the section should only apply to such cities and villages as have an organized fire department, or maintain some organization for the prevention of fires. The only question involved in the case is, whether this section had been repealed by the legislature prior to the bringing of this suit.

In 1879 an act was passed,—now forming section 30, of chapter 73, of the Revised Statutes,—relating to insurance, which reads as follows: "Every agent of an insurance company incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and

subject to the same rate of taxation, for all purposes,—State, county, town and municipal,—that other personal property is subject to at the place where located, said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: *Provided*, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax or license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

That these two sections are radically inconsistent with each other is very apparent. By section 110, of chapter 24, the city was entitled to a fixed rate of two per cent of the net receipts of the agency, and upon the amount of all premiums upon all insurance effected, or agreed to be effected, during the year; but under the act of 1879 the amount of the receipts was to be entered upon the tax lists, and the rate of taxation is to be the same as other personal property, for all purposes,—State, county, town and municipal,—at the place where the company's agency was located, which, of course, would vary in different years, and might some times be more and some times less than the two per cent. The two per cent fixed by section 110 was in reality a license fee. It was so held in the case of *The People* v. *Thurber*, 13 Ill. 554, in construing sections 22 and 23, of chapter 64, of the Revised Statutes of 1845, which require foreign insurance companies to pay to the county commissioners' clerk of the several counties in which they established agencies, three per cent on the amount of premiums charged by such companies. Section 30, of chapter 73, (the act of 1879,) by requiring the amount of these receipts to be listed, and subjecting them to taxation the same as other property, made the amount to be derived therefrom a tax, and gave every county, town or municipality where

such insurance company should have an agency, the benefit of this tax, whether it had an organized fire department, or maintained an organization for the prevention of fires, or not. Section 110, of chapter 24, however, applied only to such cities and villages as did have such fire department, or maintained an organization for the prevention of fires. That said section 30 of the act of 1879 was intended to and did repeal and take the place of said section 110 of the act of 1872, is clearly manifest by the reading of section 30 itself, wherein it expressly declares that the tax directed to be levied upon the net receipts of these insurance companies as upon other personal property, is "to be in lieu of all town and municipal licenses, and all laws and parts of laws inconsistent herewith are hereby repealed." No doubt could arise as to what is referred to by "municipal licenses," when read in the light of the case of *The People* v. *Thurber, supra.* It as plainly meant the two per cent fund required to be paid to the municipalities mentioned in section 110, of chapter 24, as though it had said so in so many words. That said section 30 of the act of 1879 should be held to repeal section 110 of the act of 1872, we entertain no doubt.

The case of *Van Inwagen* v. *City of Chicago,* 61 Ill. 31, seems also to be decisive of this question. From that case it appears that section 5 of the old charter of Chicago, approved in 1863, was identical with section 110, of chapter 24, under which this suit is brought, so far as relates to the payment of the two per cent, and there, as here, an action of debt was brought to recover the amount which the two per cent rate would come to, and there, as here, it was objected against the recovery that that section of the charter was repealed by section 30 of a law concerning insurance that had been passed in 1869, which section, so far as relates to the question we are considering, is precisely the same as section 30, of chapter 73, of the act of 1879, and in that case it was held that said section 30 of the law of 1869 repealed section 5

of the charter of 1863. This law of 1869 appears to have been afterwards repealed, and reënacted again in 1879.

The proviso contained in section 30 of the act of 1879 is not now before us for consideration, so far as plaintiff's supposed present right of action is concerned, this suit not having been brought to recover any tax or license levied under or with reference to that proviso. It is proper to observe, however, that the tax or license mentioned in this proviso requires affirmative action by the city that may be entitled to it, in fixing the rate, which may be less, but must not exceed, two per cent, and is to be upon the *gross*, instead of the *net*, receipts of the agency, which, of itself, is so widely different from the license fee established by section 110, of chapter 24, as to repeal the latter.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE NATIONAL BANK OF AMERICA

v.

THE INDIANA BANKING COMPANY.

Filed at Ottawa September 21, 1885.

1. GARNISHMENT—*form of judgment.* A judgment against a garnishee should be rendered in favor of the attachment or judgment debtor, for the benefit of the attachment or judgment creditor, who is treated as the real plaintiff, against his own debtor. Such judgment must, in form at least, be for the whole amount due from the garnishee, and whatever surplus there may be after paying the creditors entitled under the statute to share in the distribution to be made, belongs to the debtor in whose name the suit is prosecuted.

2. SAME—*surplus after paying creditors—adjustment as between the attachment debtor and garnishee.* After the creditors entitled to share in the distribution of the property attached or funds garnisheed, have been paid, if equities exist between the garnishee and the attachment debtor as to the surplus, the court, no doubt, may adjust them, and thus avoid any hardships that may arise.

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Syllabus.

3. SAME—*what creditors preferred, and in respect to what fund.* Under section 37 of the Attachment act, property, real and personal, attached, and funds in the hands of a garnishee, are placed on the same footing, and are held, from the time of the levy and service of the writ, for the benefit of all the creditors of the attachment debtor who shall obtain judgments against him within the time and in the manner specified in the statute; and such fund can not be appropriated to the payment of any other creditors until those so entitled to share in the same have been ascertained and paid.

4. SAME—*transfer of the fund by bank check drawn before and after service on the bank.* Where a depositor in a bank, before the service of process upon the bank as garnishee, at the suit of a creditor of the depositor, drew a check in favor of another, which was forwarded to the bank, and was by it paid in due course of business after the service of the writ, and charged to the account of the depositor, it was *held*, that the bank, as garnishee, was entitled to credit for the amount of the check so paid.

5. But if a bank pays checks drawn on it after it is served with garnishee process, it can not be allowed credit therefor as against the rights of creditors of the depositor entitled to share in the funds garnisheed.

6. SAME—*applying the fund to payment of obligation of the depositor to the bank.* Where a depositor indorsed a promissory note of a third person, made payable to his order, and discounted the same in a bank where he had funds to his credit, it was *held*, that a payment of the amount due on such note by the indorser, to the bank, out of his funds on deposit, after the service of garnishee process upon the bank at the suit of a creditor of such indorser, could not be allowed the bank as a set-off, the indorser's liability to the bank being that, only, of a surety, and contingent.

7. BANK CHECK—*as a transfer of money deposited, pro tanto.* If a depositor draws a check upon his banker who has funds to an amount equal or greater, it operates to transfer the sum named in the check to the payee, who may sue for and recover the same in his own name.

8. SAME—*check in favor of cashier, whether evidence of fraud.* The fact that a check is drawn by a depositor of funds in a bank, in favor of the cashier of such bank, just previous to the service upon the bank of garnishee process, is not of itself evidence of fraud or want of good faith. It is as lawful for an attachment debtor to draw his check in favor of the garnishee as in favor of any one else, if done in good faith before the service of process, and the garnishee will be entitled to credit for the amount named in the check, in the absence of evidence impeaching the transaction for fraud.

9. SAME—*by what law governed, when drawn in one State and payable in another.* A check drawn by a depositor in the State of Indiana, on his banker, payable in this State, will be construed by the laws of this State, and operate to transfer the sum named therein in accordance with the laws of this State, notwithstanding a different rule obtains in the other State.

Brief for the Appellant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. JEWETT, NORTON & LARNED, and Mr. W. C. GOUDY, for the appellant:

The statute does not direct any judgment against a garnishee for more than the amount of the plaintiff's judgment against the defendant, and costs. Garnishment is in the nature of process to obtain satisfaction of a judgment. *Gibbon* v. *Bryan*, 3 Bradw. 298; *Chanute* v. *Martin*, 25 Ill. 63.

The only interest of the attaching creditor is in the collection of his debt. As against the garnishee, no rights or privileges should be given to the attaching creditor, which he is not clearly entitled to demand. *Railroad Co.* v. *Weaver*, 54 Ill. 319; *Haywood* v. *Collins*, 60 id. 328; 12 Bradw. 450.

Sections 6 and 8 of the Attachment act direct the levy upon property, credits, etc., of sufficient value to satisfy the plaintiff's claim, and costs of suit; and the bond to release the levy, etc., is to be conditioned only for the payment of the plantiff's claim, and costs.

It is laid down in Drake on Attachments, (5th ed.) sec. 663, that "whatever the amount of the garnishee's indebtedness to the defendant, or of the defendant's effects in his hands over and above that of plaintiff's judgment against the latter, no judgment can be taken against him for more than sufficient to cover plaintiff's claim against the defendant, and costs."

The effect of the checks was to transfer to the holder the sums named therein. *Brown* v. *Leckie*, 43 Ill. 497; *Union National Bank* v. *Oceana County Bank*, 80 id. 212.

The law of the place of performance governs. *Andrews* v. *Pond*, 13 Pet. 65.

The garnishee was entitled to credit for the A. S. White note. It was to demand of the garnishee, and was a set-off, whether due or not. Attachment act, sec. 13.

Mr. A. B. JENKS, Messrs. PECKHAM & BROWN, and Messrs. STARR & EHRLICH, for various creditors for whose use the judgment was taken:

The defendant, for the uses stated in the judgment, was entitled to judgment for the full amount in the hands of the garnishee at the time of the service of the plaintiff's writ, to-wit, August 10, 1883. *Hitchcock* v. *Watson*, 18 Ill. 289; *Stahl* v. *Webster*, 11 id. 511; *Gillilan* v. *Nixon*, 26 id. 50; *Farrell* v. *Pearson*, id. 463; *Rankin* v. *Simonds*, 27 id. 352; *Cariker* v. *Anderson*, id. 358; *Walsh* v. *Horine*, 36 id. 238; *Chittenden* v. *Rogers*, 42 id. 95; *Towner* v. *George*, 53 id. 168; *Webster* v. *Steele*, 75 id. 544; *Warne* v. *Kendall*, 78 id. 598; *Fire Ins. Co.* v. *Gunning*, 81 id. 236; *Haines* v. *O'Conner*, 5 Bradw. 213; *Railroad Co.* v. *Mason*, 11 id. 525.

A garnishee is liable for moneys coming to his hands after service of process on him. *Young* v. *First Nat. Bank*, 51 Ill. 73; *Wilcus* v. *Kling*, 87 id. 107; *Wheeler* v. *Emerson*, 45 N. H. 546.

The garnishee was not entitled to credits for the amounts paid by it for the use of the defendant after service of process. *Wilder* v. *Whitehead*, 32 Vt. 765; *Parker* v. *Parker*, 2 Hill's Eq. 35; *Smith* v. *Clinton Bridge Co.* 13 Bradw. 572.

The checks being drawn and delivered in Indiana, are governed by the laws of that State. By the Indiana law, the drawing and delivery of a check is not an assignment of so much of the fund. *National Bank* v. *Second National Bank*, 69 Ind. 479.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The record in this case shows that on the 10th day of August, 1883, the Metropolitan Grain and Stock Exchange commenced a suit in the Superior Court of Cook county, by attachment, against the Indiana Banking Company,—a corporation existing under the laws of Indiana, and having its

office for the transaction of its business in that State,—for an alleged indebtedness, as stated in the affidavit, of $1563.63. The usual bond, as the statute requires, was filed, and a writ of attachment was issued, in which the National Bank of America was named as garnishee, and which was served upon such garnishee on the 10th day of August, 1883. A declaration was filed, and also the usual interrogatories in such cases, and as the defendant in attachment was a foreign corporation, publication was made as to it, as is authorized to be done by the statute, and such further proceedings were had that afterwards, on the 2d day of October, 1883, the plaintiff recovered a judgment against the attachment debtor for the sum alleged in the affidavit to be due. On the same day, the garnishee, the National Bank of America, answered the interrogatories that had been filed in court, and afterwards, by leave of court, it filed a supplemental answer, in which the items of credits which it was insisted the garnishee would be entitled to as against the rights of the attaching creditors, were more definitely stated. It appears from its answer, that on the 10th day of August, 1883, (that being the date of the service of the writ,) the garnishee had on its books, to the credit of the attachment debtor, the sum of $13,878.61, and that afterwards, on the 10th and 11th days of the same month, further sums were received, making the aggregate amount received prior to the filing of such answer, to the credit of the Indiana Banking Company, $16,288.24. By its answer the garnishee claims credit for certain sums paid after the service of the writ upon it, on account of the attachment debtor, which will be noticed in the sequel. Most, if not all, of the items claimed by the garnishee as against the rights of the attaching creditors, were disallowed by the trial court, and judgment was rendered against the garnishee for the sum of $16,000, for the "use of the Metropolitan Grain and Stock Exchange, and for the use of such other attaching creditors as are by law entitled

to share in the proceeds of this judgment." That judgment was affirmed in the Appellate Court for the First District, and the garnishee brings the case to this court on its further appeal.

Of the questions discussed as arising on this record, most, if not all of them, excepting those relating to the items of credits claimed by the garnishee, have been settled by previous decisions of this court. The cases on this subject are numerous and consistent, and it would be unwise to permit the definitiveness of these decisions to be further challenged, or to discuss the question decided, anew. No necessity appears for so doing. It has been uniformly held, since the decision in *Stahl* v. *Webster*, 11 Ill. 511, that by the practice which obtains in this State, the judgment against the garnishee must be rendered in favor of the attachment or judgment debtor, for the benefit of the attachment or judgment creditor, who is treated as the real plaintiff, against his own debtor. This, it is claimed, is according to the analogies of the law, for in all actions at law the suit must be in the name of the party in whom is the legal interest of the subject matter. It is equally well settled the judgment must, in form at least, be for the whole amount due from the garnishee, and whatever surplus there may be after paying the creditors entitled under the statute to share in the distribution to be made, belongs to the debtor in whose name the suit is prosecuted. That is necessary in order to hold the funds in the hands of the garnishee for whomsoever shall appear, under the 37th section of the statute, to be entitled to share in the proceeds of the property or funds attached. The principle is, the judgment against the garnishee in favor of the debtor in the attachment cause stands as security or as a fund, in which the other attachment creditors may participate. Of course, when these respective claimants are paid the attaching creditors can have no further interest in the collection of the judgment against the garnishee, if it is in

excess of the aggregate amount of their several claims. After the creditors have been paid, if equities exist between the garnishee and the attachment debtor as to any surplus, no doubt the court would adjust them, and thus avoid any hardships that might arise. That the 37th section of the Attachment act applies to purely garnishee proceedings, has also been frequently held by this court. *Stahl* v. *Webster, supra; Gillilan* v. *Nixon*, 26 Ill. 50; *Farrell* v. *Pearson*, id. 463; *Rankin* v. *Simonds*, 27 id. 352; *Cariker* v. *Anderson*, 27 id. 358; *Towner* v. *George*, 53 id. 168; *Webster* v. *Steele*, 75 id. 544; *Warne* v. *Kendall*, 78 id. 598; *Imperial Fire Ins. Co.* v. *Gunning*, 81 id. 236. Other cases in this court might be cited announcing the same doctrine.

But the practice in such cases has been so long settled it does not admit of further discussion. The principles of the former decisions have been recently restated by this court in the case of *Reeve* v. *Smith*, 113 Ill. 47, where it was said, in construing the 37th section of the Attachment act, (Rev. Stat. 1874,) that property, real and personal, attached, and funds in the hands of the garnishee, are placed on the same footing, —that is, when attached, such property or funds are appropriated from that time to the payment of a certain class of judgment creditors specifically enumerated. From the time of the levy or the service of the writ, the property or funds are held, by virtue of the statute, for the benefit of all the creditors of the attachment debtor who shall obtain judgments against him within the time and in the manner specified in the statute. It is the whole property or funds attached, and not any specific part or portion, that is held, until it shall be ascertained who or what creditors are entitled to share in the proceeds. Creditors who do not choose to put their claims in judgment, by attachment or otherwise, within the time limited by the statute, are not permitted to share in the proceeds of the property or funds attached,—certainly not until the claims of such attachment or judgment creditors have been satisfied.

Creditors of the attachment debtor ought not to be permitted to obtain an inequitable advantage in a fund appropriated by law for a specific purpose, by taking an assignment of it before the time shall arrive for distribution. That would contravene the positive provisions of the statute, which will not be sanctioned. The trial court followed closely the practice as indicated in the former decisions of this court, in rendering the decision in this case, and its judgment in that respect is approved.

It only remains to be considered whether there are any items of credits which ought to have been allowed to the garnishee against the attaching creditors, by the trial court. It is thought there is error in the record in this respect. It seems the case was submitted to the court, by agreement of the plaintiff in attachment, and the garnishee, for trial as to the liability of the garnishee on the facts as stated in its answer. There can, therefore, be no controverted questions of fact in the case,—otherwise the finding of the trial and Appellate courts, as to the amount due from the garnishee to the attachment debtor, would be conclusive on this court. The amount of funds in the hands of the garnishee at the date and subsequent to the service of the writ, is admitted, and it is purely a question of law what deductions and set-offs the garnishee is entitled to on the facts stated in his answer, as against the funds in his hands, on account of payments made on orders of the attachment debtor, or otherwise.

Section 13 of the Garnishment act provides: "Every garnishee shall be allowed to retain or deduct out of the property, effects or credits in his hands, all demands against the plaintiff, and all demands against the defendant, of which he could have availed himself if he had not been summoned as garnishee, whether the same at the time are due or not; * * * and he shall be liable for the balance only after all mutual demands between himself and plaintiff and defendant are adjusted, not including unliquidated damages for wrongs

and injuries." It appears from the answer, the garnishee, after the service of the writ upon it, paid two checks—one for $4.50, dated at Indianapolis, August 7, 1883, payable to the order of Henry Frommeyer, and one dated at the same place August 9, 1883, for $6400, payable to the order of E. B. Lathrop, cashier. Both checks arrived in due course of mail, and were paid in the ordinary course of business on the 11th day of August, 1883. Another item of indebtedness paid on the same day was a note of A. S. Wright & Co., made payable to the order of the attachment debtor, and by it indorsed, and which had been, previous to the service of the writ, discounted by the garnishee for the attachment debtor. On the 11th day of August, 1883, the attachment debtor directed this note should be paid out of funds to its credit on the books of the garnishee, which was done. It appears the note was still in the hands of the garnishee, and on receiving orders to do so, the sum of $4916.39 was charged to the attachment debtor as a credit on the fund in the hands of the garnishee, in payment of the note. It also appears that on the 13th, 14th and 15th of August, the garnishee paid several small drafts drawn on it by the attachment debtor. All of these payments were made after the service of the writ upon the garnishee, and it is insisted they were made in fraud of the rights of the attachment creditor.

As respects the check for $4.50 and the one for $6400, both of which it seems were drawn by the depositor on the fund on deposit with the garnishee before the service of the writ, and which were paid in due course of business, although paid after the service of process, the garnishee should have been allowed a credit for the amount of such checks on the funds in its bank, as against the attaching creditors. It was held in this court, in *Brown* v. *Leckie*, 43 Ill. 497, that when a depositor draws a check on his banker who has funds to an equal or greater amount, it operates to transfer the sum named in the check to the payee, who might sue for and

recover the same from the depositary. The transfer of the check, it was said, carried with it the amount named in the check to each successive holder. The same doctrine was restated in *Union National Bank* v. *Oceana County Bank*, 80 Ill. 212, and it was further held, in the latter case, that after such check had passed into the hands of a *bona fide* holder, it was not in the power of the drawer to countermand the order of payment. The two checks first named,—the one for $4.50, and the one for $6400,—come within the operation of the rule stated. Both of them were drawn by the depositor on its banker prior to the service of process, and at a time when there were funds on deposit more than sufficient to pay them. The drawing of the checks, under the decisions of this court, operated precisely as if the money had, in fact, been drawn out of the bank before the issuing and service of the process of garnishment. It is the undeniable right of the depositor at any time to withdraw his funds on deposit, and if it is done before the rights of third parties attached, there can be no ground for complaint. That he may do by drawing his check upon such depositary, in the usual course of business, as lawfully as in any other way. That was done in this case. The legal effect of drawing these two checks was the reduction or drawing out of the bank the amounts therein specified, and lessen the fund to that extent that was subject to attachment, although not presented for payment until after process was served upon the garnishee. It is suggested the check for $6400 may not have been drawn in good faith, and in the usual course of business. How that may be there is nothing in this record to show. That which is said to impeach the transaction is the fact the check is made payable to "E. B. Lathrop, cashier." Who "E. B. Lathrop, cashier," is, does not appear from anything in the answer; but it is said the appeal bond in this case is signed by "E. B. Lathrop, cashier," and it is therefore concluded he is the cashier of the defendant bank. Be that as it may, the transaction may still be con-

sistent with commercial dealings. It would be as lawful for the attachment debtor to draw its check in favor of the garnishee as in favor of any one else, and if done in good faith, it was just as rightful. If the check was not *bona fide*, as is suggested, and after the money was transferred to the debtor bank it still belonged to the attachment debtor, of course it would be liable to the attachment. That is a matter of defence which does not appear in the present record.

It is made a point against the allowance of these checks as credits or reductions from the funds in the hands of the garnishee, that by the laws of Indiana the drawing of checks by a depositor on his banker does not operate to transfer the sums named in them to the payee, as is the rule in this State, and for that reason they are not proper credits for the garnishee. It is a sufficient answer to the position taken, the law of the place of the performance of a contract must govern. The checks, although drawn in the State of Indiana, were made payable in this State, and hence the law of this State is applicable, and must control. It will be noticed the check on which a recovery was allowed in *National Bank* v. *Oceana County Bank*, *supra*, was drawn in another State on a bank in this State. The principle of that case is conclusive of the same point in the case being considered. That being so, under the laws of this State, by the act of drawing these two checks, the amount of the same was transferred from the depositor to the holder, and the garnishee will therefore be entitled to a credit for the sums specified in them, unless it shall be made to appear the check for $6400 was not drawn in good faith, and that the money, after it was transferred to the garnishee, was still the money of the attachment debtor.

The other checks paid by the garnishee do not appear to have been drawn before the service of the writ, and as they were paid after the service of process, that brings them within the operation of the rule stated in *Reeve* v. *Smith*, *supra*, which forbids any assignment or transfer of the funds attached after

the service of the writ and before the time for distribution, and as to them no credits or reductions should be allowed to the garnishee, as the payments of them were made in fraud of the rights of the attaching creditors. Nor should any credit or deduction or set-off be allowed to the garnishee on account of the amount charged to the attachment debtor, in lieu of the note of A. L. Wright & Co., held by the debtor bank at the time of the service of the writ of attachment. It was not a debt or demand due either from the plaintiff or defendant to the garnishee, and it was not an item for which a deduction or set-off might be allowed under the statute. It was simply the debt of A. L. Wright & Co., as to which the attachment debtor was a mere surety or indorser in case default should be made in its payment by the principals. That might never occur. What was done was equivalent to an attempt to buy back the note by the attachment debtor, and in that way withdraw the amount paid from the fund attached. This the law will not permit after the service of the writ upon the garnishee.

On account of the errors indicated in this opinion, the judgment of the Appellate Court will be reversed, and the cause remanded to the Superior Court.

Judgment reversed.

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JOHN SCHMIDT

v.

J. LOUIS PFAU, JR.

Filed at Springfield September 23, 1885.

1. EVIDENCE—*relevancy—in suit to recover for services in the management of a business—mismanagement on the part of the agent as a defence.* In a suit to recover compensation for services as manager of a foundry and machine shop, in which the defence sought to recoup damages resulting from the alleged neglect of duty and mismanagement of the business on the part

of plaintiff, producing a failure in the business, the plaintiff, in his testimony, incidentally stated as his opinion that the business was terminated because of his refusal to work for $300 a year. On cross-examination he was asked if the true reason of the closing of the business was not because the firm had lost money from the beginning to the end, which the court, on objection, refused to allow: *Held*, no error in refusing to allow the question to be answered, as the subject matter of the inquiry could not have had any legitimate bearing upon the real issue in the case.

2. SAME—*as to the manner of showing mismanagement by the agent in such case.* On an issue as to the plaintiff's right to recover for services as general manager of defendants' business in the carrying on of a foundry and machine shop, in which damages are sought to be recouped for mismanagement and neglect of duty on the part of the plaintiff, the burden of proof to establish the defence is upon the defendants, and the particular acts of misconduct or omissions of duty should be specifically pointed out, so as to enable the plaintiff to meet the same by direct proof. Evidence of the reputation of the work done is not admissible to establish such defence, as it might arise from other causes not attributable to the plaintiff.

3. SAME—*opinions of witnesses on that subject.* On an issue as to the improper or unskillful management of the business of a firm by an employe suing for his services, it is not proper to allow one of the defendants, as a witness, to give his opinion as to the effects of the plaintiff's management upon the profits and losses of the firm during the time he controlled its affairs.

4. SAME—*improper keeping of books of account—how to be shown.* For the purpose of showing that a plaintiff suing for wages had improperly kept defendants' books, they produced an exhibit made by the plaintiff of the partnership accounts, and asked an accountant who had examined the books, this question: "Mr. S., I place in your hands a statement, and I will ask you how that statement corresponds with the result of your examination of the books as to the indebtedness, or the amount of money these partners of the Ætna Iron Works put in the business:" *Held*, that the question was improper, both in form and substance. The proper mode of proving an improper keeping of the books of a firm by its book-keeper, is to ask the witness whether, upon his examination of the same, he found any errors, and if so, to state what they were.

5. SAME—*availing of statements that are favorable, and rejecting such as are not.* A party may rely on admissions made by the other party, in his testimony, against his interest, without being concluded by other statements made in exoneration of his liability, or in his favor. The statements of a party made against his interest may be accepted and acted upon by the jury as true, while others made in his favor, though at the same time and as part of the same conversation, may be rejected.

6. SAME—*cross-examination as to matter not germain to evidence in chief.* In an action against a firm for services as manager and book-keeper,

the plaintiff's father, who was a member of the firm, in testifying on behalf of the plaintiff, stated that the latter spent most of his time in the employment of the firm. On cross-examination the witness was asked if he thought during the year 1877 his and his son's profits in another business distinct from that of the defendant firm, or the witness' share of the profits therein, amounted to $2000, the object being to show that the business of the witness, in which the plaintiff had an interest, was profitable, while that of the defendants was not,—leaving the jury to infer that the plaintiff fostered the business of himself and father to the neglect of that of the defendants: *Held*, that the question was not proper on cross-examination, and if allowable at all, was matter in chief.

7. AGENT—*whether liable to his principal for errors of judgment in the management of the business of the latter.* Where an agent or manager of another is clothed with a general discretion in the management of the business intrusted to him, he will not be held responsible for an honest mistake in its exercise, provided he acts with reasonable skill and ordinary diligence. In such case there is no implied guaranty of the success of the business on the part of the agent, and if losses occur, the principal must bear them.

8. LIMITATION—*when the statute begins to run—service by the year.* Where services are performed by one for another by the year, without any agreement as to the time for their payment, the law will presume them as payable at the end of each year, and the Statute of Limitations will not run against the first year's services until the end of that year.

9. SAME—*admission of indebtedness as taking case out of the statute.* An admission of a party that he owes another for services rendered, within five years before action brought, will take the case out of the Statute of Limitations, although the amount to be paid for such services may not have been fixed.

10. INSTRUCTIONS—*of a proper reference to the evidence.* An instruction based upon admitted facts or facts not disputed, is not erroneous merely from the fact it fails to contain the words, "if you believe, from the evidence," such facts. Such reference to the evidence is necessary only when the facts hypothetically stated are controverted.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. JOHN H. WILLIAMS, Judge, presiding.

Mr. W. W. BERRY, for the appellant.

Messrs. CARTER & GOVERT, for the appellee.

Mr. CHIEF JUSTICE MULKEY delivered the opinion of the Court:

J. Louis Pfau, Jr., the appellee, brought an action of assumpsit to the March term, 1883, of the Adams county circuit court, against John Schmidt, (the appellant,) John L. Pfau, Sr., and Theodore Brittenberger, as partners, lately doing business under the firm name of "Ætna Iron Works," to recover for work and services claimed to have been rendered by him as general manager of the company, from the 25th day of February, 1877, to the 25th day of February, 1880. There was no service on Brittenberger. Defendant Pfau admitted the justness of plaintiff's claim, and consented that judgment might be rendered against him. Pleas of the general issue, Statute of Limitations, and set-off, were filed by Schmidt, and the cause was tried before the court and a jury, resulting in a verdict and judgment in favor of plaintiff, for $3600, which was affirmed by the Appellate Court for the Third District, and Schmidt alone appealed to this court.

The partnership in question was formed in 1875, for the purpose of carrying on a foundry and machine shop at Quincy, Illinois. At that time appellant was engaged in the practice of medicine, and Pfau, Sr., was carrying on other branches of business on his own account, namely, the manufacture of hot-air furnaces, and the galvanized iron and tin and stove business, and the evidence tends to show that these two members of the firm,—particularly the latter,—were expected to give but little, if any, of their personal attention to the business of the company. The understanding seems to have been, that in discharging their share of the labor and duties pertaining to the business, they were to be respectively represented by their sons, the appellee, and Albert Schmidt, a young man then about eighteen years of age, under the general supervision of Brittenberger, who was to give his personal attention to the affairs of the concern. Under this

arrangement neither of the sons was to receive from the company any compensation for his services. The business of the partnership was continued under this arrangement until the latter part of 1875, when Brittenberger abandoned the concern, and its management thereafter devolved mainly upon appellee, without any other or different understanding, and it so continued until the 25th of February, 1877, when, as claimed by appellee, it was mutually agreed between himself, his father and appellant, that young Schmidt should retire from the business, and that appellee should take charge of it as chief manager, and give to it his undivided time and attention.

That appellee did serve as manager of the concern for three years, from the 25th of February, 1877, is conceded. But it is claimed by appellant, that appellee's compensation was fixed at $300 and traveling expenses for the first year, and that by a subsequent agreement he was to receive after the first year, in lieu of a fixed salary, a commission on sales—ten per cent on small jobs and three on large ones. This alleged agreement, so far as it relates to compensation, is positively denied by appellee, the latter claiming that that matter was left open and unsettled. It is also claimed by appellant that appellee did not give to the business his entire time and attention, as he had agreed to do, and that by reason of its neglect, and his unskillfulness and bad management, the company sustained heavy losses, and the business proved a failure. These several claims of the appellant are distinctly denied by appellee, and the evidence relating to the subject is conflicting and wholly irreconcilable. Such being the case, it is hardly necessary to add that the issues thus raised must be regarded as conclusively settled in favor of appellee by the judgment of affirmance in the Appellate Court. The errors relied on for a reversal, here, question the correctness of the ruling of the trial court upon the admissibility of evidence, and in the giving, refusing and modification of instructions.

It appears that on the 25th of February, 1880, the parties met at their business office for the purpose of a general settlement, at which it was determined to stop and wind up the business. Appellee, in speaking of this meeting in his testimony, incidentally stated as his opinion that the partnership business was thus suddenly terminated because he told appellant he would not work for $300 a year. Upon his cross-examination he was asked this question: "Was not the true reason of this firm quitting business that it had lost money from beginning to the end?" The court, upon objection, held the question improper, and this is assigned for error. The ruling of the court in this respect affords no ground for reversal. The answer to the inquiry, let it have been the one way or the other, would have had no bearing upon the merits of the controversy or the issues submitted to the jury. The main question for their determination was, what, if anything, did the defendants owe the plaintiff on account of his services prior to their stopping business. The answer of the witness, if responsive to the question, would, at most, have been but the expression of an opinion upon a mere collateral matter, and on this ground, the question, to say the least of it, was of doubtful propriety, and, consequently, within the discretion of the court to allow it or not, as it thought proper. The parties had a clear right to stop business at the time they did, without regard to the motives or reasons that induced them to do so, and hence any evidence on that subject would more than likely have diverted the attention of the jury from the real issues involved. In any view, we perceive no error in disallowing the question.

It is also claimed that the court erred in refusing to permit Pfau, Sr., to answer, on cross-examination, the following question: "Do you think during 1877 the profits of yourself and Louis, or your share of the profits, amounted to $2000?" The object of this inquiry was to show that the business of Pfau, Sr., in a part of which appellee had an interest, was

successful, while that of the Ætna Iron Works was unprofitable, leaving it to be inferred by the jury that appellee had fostered the business of himself and father to the neglect of that of the firm. Waiving the competency of the evidence offered, which, to say the least of it, is extremely doubtful, we do not think it was proper on cross-examination. It was not germain to anything called out on the direct examination, and if admissible at all, it was clearly matter in chief. The court therefore ruled correctly in holding it improper. The only pretence for asking it is the witness' statement, on redirect examination, that appellee "spent pretty much all his time" in the employment of the firm. Upon what principle this statement would authorize appellant to go into a general inquiry as to what profits the witness, or the witness and his son, were realizing in a wholly different business, and one in which the appellant had no concern, is not perceived. There is clearly no merit in the objection.

It is further objected, the court erred in not permitting appellant to prove the general reputation of the work done at the Ætna Iron Works during the years covered by appellee's service. We are aware of no precedent for the admission of such evidence under like circumstances, and are satisfied that the general principles upon which it is admissible at all, have no application to the case in hand. The issues in it are very simple. The plaintiff sued to recover for three years' services as business manager of the defendants. One of the defendants admits the justness of the claim, and the other denies it. The appellant says, "True, you worked for us that period of time, but you neglected our business, and did not do your work properly, by reason of which we have sustained damages, which we seek to recoup in this action." Upon the issue thus tendered by appellant, the burden was upon him, and it could not be established by evidence of the character offered. If, as claimed, the plaintiff neglected the business of the firm or did their work improperly, that was a fact sus-

ceptible of direct proof, and as a matter of justice to him, the particular acts of improper conduct or omissions of duty on his part should have been specifically pointed out, so as to have enabled him to meet the charge in an equally direct and specific way. Suppose it be conceded the reputation of the products of the establishment for the period in question was bad, it does not necessarily follow that it resulted from the plaintiff's neglect of duty. Moreover, the bad reputation of the work may have been undeserving, or it may have been caused by the original improper construction of the establishment, or the character of the machinery put into it. This bare suggestion shows the impropriety and danger of admitting such evidence, even if it were not objectionable on the ground already stated. The probable effect of admitting such testimony, would be to incumber the case with numerous collateral issues but remotely bearing upon the real merits of the controversy.

At the settlement of the 25th of February, 1880, appellee made a statement in writing, showing the state of the partnership account between appellant and Pfau, Sr., which is annexed to his testimony as "Exhibit A," one item of which, as already seen, was placed there by appellee under protest. Counsel for appellant, referring to this statement, asked the witness Schanz, who had also prepared a statement relating to the condition of the partnership accounts, the following question: "Mr. Schanz, I place in your hands a statement, and I will ask you how that statement corresponds with the result of your examination of the books as to the indebtedness, or the amount of money these partners of the Ætna Iron Works put in business." The court, on objection, held the question improper, and its ruling in this respect is assigned for error. We do not think the point is well taken. On the contrary, we regard the question improper, both in form and substance. If appellee committed any errors in keeping the partnership books, by which appellant sustained loss, it would

have been permissible to show that fact; but the proper course in such case would have been to ask the witness whether, upon his examination of the books, he found any errors, and if so, to state what they were. Yet, even if the court had erred in disallowing this question, the appellant was not prejudiced by it, for this witness seems to have testified fully as to the condition in which he found the books, and as to appellee's method of keeping them, and the whole matter was before the jury.

Again, it is objected the court erred because it would not permit appellant to give his opinion as to the effects of appellee's management upon the profits and losses of the concern during the three years he controlled its affairs. The court clearly ruled properly on this question. As already indicated, if appellee had been guilty of any improper conduct in the management of the company's affairs, it was a matter susceptible of proof, and the evidence should have been directed to that issue. Perilous, indeed, would be the position of a general manager, if he could be held personally responsible for a failure of the business, upon the mere opinions of witnesses as to the character of his management, based largely, perhaps, upon the very fact of the failure itself. Where one is clothed with a general discretion in the management of the business of another, as was the case here, he will not be held responsible for an honest mistake in its exercise, provided he has acted with reasonable skill and ordinary diligence. In such case there is no implied guaranty of the success of the business on the part of the agent, and if losses occur, the principal must bear them.

In respect to the remaining exceptions not specially noticed, it is sufficient to say, in general terms, we do not regard any of them well taken. They are, in many respects, much like those considered, and the general observations already submitted apply with equal force to them.

At the instance of the plaintiff, the court gave to the jury the following instruction:

"In respect to the Statute of Limitations, set up by the defendant John Schmidt, the jury are instructed that if the plaintiff performed the labor and services for which the suit is brought, by the year, at the request of the defendants John Schmidt and John L. Pfau, as two of the partners in the Ætna Iron Works, and no time was fixed as to when such labor and services were to be paid for, the law would presume that they were to be paid for at the end of the year; and if the first year ended any time after the 21st day of February, A. D. 1878, then no part of such labor and services would be barred by the Statute of Limitations, and the jury should find that issue for the plaintiff."

The instruction is objected to on two grounds: First, it is said by counsel, "it does not connect itself with the evidence anywhere or by any terms, but simply states that if the plaintiff performed the labor and services for which the suit is brought, by the year, at the request of the defendants, then the law is so and so,"—or, more shortly put, as we understand this branch of the objection, the instruction does not contain the usual formula, "*if the jury find, from the evidence,*" etc. The omission of these words, under the circumstances, we regard as wholly unimportant. It was a conceded fact that appellee worked for the company three years, and that there had been no settlement, or attempt at settlement, between the parties, on account of his services, until he stopped work altogether on the 25th of February, 1880, and appellant himself swears that it was the original agreement to pay appellee $300 a year. Assuming this to be true, there was no ground whatever for interposing the Statute of Limitations, for the five years did not commence running as to the first year's service until the 25th of February, 1878, and the suit was commenced on the 21st of February, 1883. Where an in-

struction, based upon a fact conceded by the party against whom it is given, properly declares the law, upon the hypothesis that the admitted fact is true, it will be no objection to the instruction that it does not contain the words, "*if you believe, from the evidence.*" The same rule applies in any case where an instruction sets forth a state of facts hypothetically, about which there is no controversy in the evidence. It is only where the facts, hypothetically stated, are controverted by the party against whom the instruction is given, that the formula, "*if you believe, from the evidence,*" etc., becomes important.

It is claimed, in the second place, there is no evidence in the record upon which to base this instruction. This claim is clearly without any foundation, as is fully shown by what we have already said. In addition to this, it is an undeniable fact that at the meeting of the parties on the 25th of February, 1880, the claim of appellee for his services was conceded by all of them as an existing indebtedness, and the only controversy was as to the amount. The appellant on that occasion, according to the testimony of appellee, in referring to this claim, said: "This matter of salary has not been settled yet,—*we owe you for three years' salary,*"—and we fail to find any denial in the record of the statement thus attributed to appellant, and it is hardly necessary to add, this admission of appellant clearly took the case out of the statute, even if his salary had been payable monthly. The answer of appellant to this is to the effect that if his testimony is looked to for the purpose of proving any particular fact, it must be accepted as a whole, and for all purposes. This view of the law is clearly unsound, and finds no support from English or American authority. It is a familiar principle of the law of evidence, as it obtains in this country and in England, that the statements of a party made against his own interest may be accepted and acted upon by the jury as true, while others made in his favor, though at the same time and as part of

the same conversation, may be rejected as unworthy of belief. In such case, all that the witness has said relating to the particular matter in question goes to the jury for their consideration, but when considered, they may believe such parts of the statement as seem reasonable and probable, and reject the balance. 2 Best on Evidence, sec. 520.

There are other exceptions to the rulings of the court upon the instructions discussed in appellant's brief, but we do not regard any of them as well taken, and as the present opinion is already extended beyond desirable limits, we do not deem them of sufficient importance to discuss them in detail.

The judgment will be affirmed.

Judgment affirmed.

GEORGE PANTON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa September 21, 1885.

1. CRIMINAL LAW—*self-defence when danger only apparent.* If a person assaulted in such a manner and under such circumstances as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life or suffering great bodily harm, acts under such belief, he will be justified in defending himself, whether the danger is real or only apparent.

2. SAME—*as to the grade of the offence—the jury to determine, not the court.* Under an indictment for murder the accused may be found guilty of manslaughter, and the instructions in such a case should leave the jury free to find whether he is guilty of murder or manslaughter. Therefore, an instruction that if the jury shall believe, from the evidence, certain facts, they should find the defendant guilty of murder, is erroneous. It should direct no more than to find him guilty.

3. WITNESS—*credibility of one charged with crime, when testifying in his own behalf.* A clause in an instruction, on the trial of a party upon a charge of murder, who had testified in his own behalf, after reciting certain facts, was to this effect: "And if, from all such facts and circumstances in evidence, the jury believe that he (the defendant) has testified falsely upon any material point in issue in the case, then they have the right to entirely

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disregard his evidence, except so far as it may be corroborated by other credible proofs or circumstances in evidence." The instruction was held erroneous, in omitting the essential element that the witness had willfully and knowingly sworn falsely.

4. ERROR WILL NOT ALWAYS REVERSE—*as to instructions.* An instruction given on the trial of a person upon the charge of murder, upon the law of self-defence, against the defendant, though abstractly erroneous may not afford a ground for a reversal of a judgment of conviction, where no case of self-defence is shown by the evidence.

WRIT OF ERROR to the Circuit Court of Boone county; the Hon. C. W. UPTON, Judge, presiding.

Mr. FRANK CROSBY, Mr. CHARLES E. FULLER, and Mr. JOHN A. RUSSELL, for the plaintiff in error:

The fourth of the People's instructions, to the effect that to make the plea of self-defence availing it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, is not and never was the law. *Campbell* v. *People*, 16 Ill. 17; *Schnier* v. *People*, 23 id. 17; *Maher* v. *People*, 24 id. 241; *Roach* v. *People*, 77 id. 30; *Davison* v. *People*, 90 id. 221; *Steinmeyer* v. *People*, 95 id. 383; *Gainey* v. *People*, 97 id. 270; *Wilson* v. *People*, 94 id. 299.

The People's tenth instruction is equally erroneous. The last clause, "and you should find him guilty of murder," is not only a positive order from the court to convict, but it instructs the jury virtually to pay no attention to any other defence than that of insanity, and to consider no mitigating circumstances, but to find defendant guilty of murder. *Roach* v. *People*, 77 Ill. 30.

Mr. A. J. HOPKINS, Mr. N. J. ALDRICH, Mr. F. H. THATCHER, and Mr. T. E. RYAN, for the People:

The fourth of the People's instructions is in the exact language of section 149 of the Criminal Code. (*Kinney* v. *People*,

108 Ill. 520.) In all the cases cited by plaintiff in error the only defence relied on was self-defence.

Even if improper instructions have been given or other errors intervened, yet if substantial justice has been done, the judgment will not be disturbed. *Greenup* v. *Stoker*, 3 Gilm. 215; *Dishon* v. *Schorr*, 19 Ill. 63; *Leigh* v. *Hodges*, 3 Scam. 18; *Gillett* v. *Sweat*, 1 Gilm. 490; *Newkirk* v. *Cone*, 18 Ill. 454; *Elam* v. *Badger*, 23 id. 502; *Insurance Co.* v. *Wetmore*, 32 id. 251; *Railroad Co.* v. *Swearingen*, 47 id. 209; *Bandalow* v. *People*, 90 id. 221; *Ritzman* v. *People*, 110 id. 362.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The judgment in this case must be reversed for the giving of three erroneous instructions on behalf of the People, as follows:

"The court instructs the jury that when a person charged with murder, and not affected with insanity as explained to you, sets up as a justification or defence that he killed such person in self-defence, to make such plea of self-defence availing it must appear that the danger was so urgent and pressing that in order to save his own life or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.

"The court instructs the jury that it is not every degree or kind of insanity that will excuse the commission of a criminal act, and in this case, if you believe, from the evidence, beyond a reasonable doubt, that the defendant committed the homicide charged, and at the time of committing the same that he was able to distinguish between right and wrong, and knew that the act committed was wrong and in violation of law, and that he was liable to be punished there-

for, and that he had the power to abstain therefrom, then, no matter what delusion he may have had or what tendency to insanity from hereditary causes, such insanity would not constitute a legal defence in this case, and you should find him guilty of murder.

"The court instructs the jury that by a statute in this State the prisoner is permitted to testify in his own behalf, but by such permission under the statute the jury are not bound to accept of the prisoner's statements upon the witness stand as to the truth. They have the right, in determining how much, if any, credence they will give to his statements, to take into consideration the facts and circumstances in evidence in the case, the manner and conduct of the prisoner while on the witness stand, his interest in the result of the suit; and if, from all such facts and circumstances in evidence, the jury believe that he has testified falsely upon any material point in issue in this case, then they have the right to entirely disregard his evidence, except so far as it may be corroborated by other credible proofs or circumstances in evidence in this case."

In *Roach et al.* v. *The People*, 77 Ill. 26, a like instruction as the first was held erroneous, in that it would convey to the minds of the jury the idea that the defendants could not sustain their alleged justification of self-defence unless their danger was not only apparently imminent, but was actual and positive. This court has repeatedly held, that if the defendant was assaulted by the deceased in such a manner as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, when acting under such reasonable belief he was justified in defending himself, whether the danger was real or only apparent. *Campbell* v. *The People*, 16 Ill. 17; *Schnier* v. *The People*, 23 id. 28; *Davison* v. *The People*, 90 id. 221.

The last clause of the second above instruction was wrong in saying, "and you should find him guilty of murder." Under an indictment for murder a defendant may be found guilty of manslaughter, and the jury, here, should have been left free to find in that respect, without being directed by the court how they should find. The court should have said no more in such respect in the instruction than that the jury should find the defendant guilty.

The last clause of the third above instruction, "and if, from all such facts and circumstances in evidence, the jury believe that he has testified falsely upon any material point in issue in this case, then they have the right to entirely disregard his evidence, except so far as it may be corroborated by other credible proofs or circumstances in evidence in this case," was erroneous, in omitting the essential element that the witness had willfully or knowingly sworn falsely. *Brennan* v. *The People*, 15 Ill. 512; *City of Chicago* v. *Smith*, 48 id. 107; *Pollard* v. *The People*, 69 id. 148.

Of the first instruction, although abstractly erroneous, it might be said that it did the defendant no harm, and was not ground for reversal because of there being no case of self-defence presented by the evidence. (*Leach* v. *The People*, 53 Ill. 318; *Wilson* v. *The People*, 94 id. 327; *Ritzman* v. *The People*, 110 id. 362.) But the two other instructions, especially the last, can hardly be passed over as harmless, as not calculated to prejudice, and as not actually prejudicing, the defendant.

The judgment is reversed, and the cause remanded.

Judgment reversed.

Syllabus.

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EDWARD S. MULLINER

v.

CHARLES M. BRONSON.

Filed at Springfield September 23, 1885.

1. CONTRACT—*construed—as to right of buyer to determine as to the quality of goods purchased and delivered.* A contract for the sawing, and delivery to the purchaser, of lumber, providing that he should measure the same when delivered, and that he should measure and pay for only such as was absolutely clear, and suitable for a certain purpose, while it gives the buyer the right to measure the lumber and pass upon its quality, does not make him the sole judge, and his decision beyond review. In such case, he is bound to receive and measure such of the lumber as complies with the contract, although in his judgment it is not of the proper quality.

2. EVIDENCE—*to show quality of lumber delivered.* In a suit upon a contract for the sawing and delivery of lumber to the defendant at his yard in a city, containing a clause that defendant should measure the same after its delivery, and only such as was absolutely clear and would work into tobacco boxes, there is no error in admitting the testimony of witnesses who saw the lumber after it was sawed, in the timber, and when it was being shipped, to show its quality when delivered. If injured while being shipped, such fact might be shown.

3. EXCEPTIONS—*when necessary—in case of remarks of the trial judge, claimed to have been improper.* After a cause had been reversed for misconstruction of a contract, and on the second trial the court remarked, in the hearing of the jury, without anything to call for the same, that he had not changed his opinion as to the proper construction of the contract, but that the Appellate Court had decided the question and the court was bound to follow the decision, but no exception was taken to such remark, it was *held*, that the defendant, by failing to except thereto, waived all objection that might have been made to what was said by the court.

4. INSTRUCTION—*whether leaving construction of a verbal contract to the jury.* An instruction in a suit to recover for lumber sawed and delivered, partly under a written contract, as alleged, and partly under a verbal one, directing the jury that if they found, from the evidence, that a part of the lumber was furnished on a verbal contract made subsequent to the one in writing, then they should find, from the evidence, what the terms of such contract were, and be governed by them, is not obnoxious to the objection that it submits to the jury the construction of such verbal contract, and is not improper.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. JOHN H. WILLIAMS, Judge, presiding.

Mr. A. E. WHEAT, and Mr. C. A. BABCOCK, for the plaintiff in error:

In actions *ex contractu*, where the preponderance of evidence is great as to the fact of performance, and the finding below is against it, a new trial should be awarded. *Lawrence* v. *Atwood*, 1 Bradw. 217; *Railroad Co.* v. *Dingman*, id. 162; *Drury* v. *Dungan*, 2 id. 15.

The verdict and judgment must be supported by evidence. Wholly unsupported by evidence it can not stand. *Ragor* v. *Kendall*, 70 Ill. 95; *Pease* v. *Callin*, 1 Bradw. 88.

If a contract is ambiguous, it is the duty of the court to determine what it means from the evidence, and instruct the jury as to its meaning. *Ogden* v. *Kirby*, 79 Ill. 559.

It is a question for a jury, and a matter of fact, what contract has been made; but this ascertained, it becomes a question of law for the court to interpret and ascertain the meaning of the parties to it, and to declare their respective rights, and the extent of their obligations. See *Sigsworth* v. *McIntyre*, 18 Ill. 128.

The rule is well settled that the construction of contracts, written or verbal, is for the court, and can not be expounded by witnesses. *Lintner* v. *Milliken*, 47 Ill. 181; *Streeter* v. *Streeter*, 43 id. 155; *McAvoy* v. *Long*, 13 id. 147; *Riley* v. *Dickens*, 19 id. 29.

A jury should find the meaning and intent of a contract under the instructions of the court, and any mistake in the true intent, imparted by the language used in such instructions, is error, and subject to correction. *Railroad Co.* v. *Cassell*, 17 Ill. 389; *Kamphouse* v. *Gaffner*, 73 id. 453.

The jury should have been left free to consider the evidence given by both parties, without any expression of opinion by the court. *Lycan* v. *People*, 107 Ill. 428.

Mr. GEORGE M. JANES, for the defendant in error:

All the presumptions are in favor of sustaining the verdict, which will not be lightly disturbed. *Blake* v. *McMullen*, 91 Ill. 32.

Even when the evidence in support of the verdict is inconclusive and contradictory, a new trial can not be awarded. *Milliken* v. *Taylor*, 53 Ill. 509; *Young* v. *Rowley*, 60 id. 148; *Lewis* v. *Lewis*, 92 id. 237; *Howitt* v. *Estelle*, id. 218; *Buchanan* v. *McLennen*, 105 id. 60.

When the evidence is so far conflicting as to present a fair question of fact for the jury, their decision should be regarded as final. *Tedens* v. *Schumers*, 14 Bradw. 610.

There is no error in refusing instructions the substance of which is contained in others given. *Freiburg* v. *People*, 102 Ill. 160; *City of Burlington* v. *Perdue*, 99 id. 329; *Abney* v. *Austin*, 6 Bradw. 49.

It is the amount of clear lumber that could have been measured out of what was delivered, that is the subject matter of this suit. *Mulliner* v. *Bronson*, 14 Bradw. 360.

Remarks of the court complained of, whether entirely proper or not, did not prejudice the cause of appellant, and not having been excepted to when made, constitute no ground for a new trial. *Beasley* v. *People*, 89 Ill. 580; *Wiggins Ferry Co.* v. *People ex rel.* 101 id. 449.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Charles M. Bronson, in the Adams circuit court, against Edward S. Mulliner, to recover a balance claimed to be due for a certain quantity of lumber which plaintiff had sold and delivered to defendant. The declaration contained the common counts,

and on a trial before a jury the plaintiff recovered a judgment for $600, which, on appeal, was affirmed in the Appellate Court.

It appears from the evidence, that on the 28th day of September, 1881, Bronson and Mulliner entered into a contract in writing, under which Bronson agreed to move his saw-mill, and set it up in the sycamore timber growing on land belonging to J. R. Cronk, five miles north-west of Mendon, and saw for Mulliner two hundred and twenty thousand feet of lumber. The contract contained this provision: "Mulliner to measure said lumber after it is delivered, dry, at his yard in Quincy, Illinois, and to measure such, only, as is absolutely clear, and will work into tobacco boxes." The lumber was sawed and delivered, but it was contended by the defendant that a portion of it was not absolutely clear, and he was not bound to measure and pay for that portion; while, on the other hand, plaintiff claimed that the quality of the lumber complied with the contract.

On the trial, the court ruled that the condition of the lumber before it was shipped was immaterial,—that the evidence must show the lumber, after it was delivered at the defendant's yard, in Quincy, complied with the contract; but the court also admitted evidence of witnesses who saw the lumber after it was sawed, and while it was being shipped, as tending to establish the quality of the lumber delivered,—and the admission of this evidence is relied upon as error. While it is true, under the contract, that the quality of the lumber was to be determined on the measurement at defendant's yard after it had been delivered, still, where witnesses saw the lumber after it was sawed, in the timber, and saw it when it was being shipped, such evidence was competent tending to prove the quality of the lumber after it had reached the possession of defendant, and we think such evidence was properly admitted. If the lumber was clear after it was sawed and placed on wagons or cars for shipment to defendant, it could

not become different or other than clear lumber on its arrival. The lumber was hauled in wagons some five miles from the mill, to a station on the railroad, and there shipped on cars. The men who loaded the lumber on wagons, and unloaded onto the cars, would doubtless form an opinion as to its quality, and the facts thus obtained were competent evidence tending to show the quality of the lumber when it was to be measured in defendant's yard. If the lumber was damaged by shipment, that might readily be proven.

It is also contended that on the trial the presiding judge made remarks and expressions of opinion that tended to influence the jury in making up their verdict. This was a second trial of the cause. An appeal was taken from the judgment rendered on the first trial, to the Appellate Court, and the judgment was reversed, the Appellate Court holding that the circuit court had not placed the proper construction on the contract. On the last trial, when the construction of the contract again arose, the circuit judge remarked that he had not changed his opinion as to the proper construction to be placed on the contract, but the Appellate Court had decided the question, and the circuit court was bound to follow the decision. Other remarks of a similar character were made during the trial. The remarks which were made by the circuit court were uncalled for by any question which arose in the case, but whether they should be regarded as error for which the judgment should be reversed, it will not be necessary to determine, for the reason that the record shows no exception whatever taken to the remarks so made. If the appellant desired to raise the question as to the right of the circuit judge to make the remarks, he should have excepted at the time; but, under our practice, if he made no objection at the time, his silence will be regarded as a waiver of all objection that might have been made to what was said by the court.

Objection has been made to the decision of the court in instructing the jury. It is claimed that plaintiff's second

instruction is faulty, because it submits the construction of a certain verbal contract to the jury. This is a misapprehension of the instruction. The jury were merely directed that if they found, from the evidence, that a part of the lumber was furnished on a verbal agreement made subsequent to the written contract, then they should find, from the evidence, what the terms of the contract were, and be governed by it. We perceive nothing improper in this charge to the jury.

The third instruction, it is claimed, nullifies that clause of the contract which provides for the measurement of the lumber by the defendant. The instruction directs the jury that the measurement should be in accordance with the requirements of the contract,—that the defendant had no right to reject lumber which complied with the contract because he did not consider it of that quality specified in the agreement. We think this was correct. While the defendant had the right to measure the lumber and pass upon its quality, he was not the sole judge, nor was his decision beyond review. If lumber was delivered, which, as a matter of fact, complied with the contract, he was bound to receive it, although in his private judgment it might not be of that quality which the contract required.

We perceive no substantial objection to plaintiff's eighth instruction.

The modification of defendant's fifth instruction, by striking out the words, "in his judgment," was done with the view to inform the jury that the decision of defendant in measuring the lumber as to its quality, was not absolutely final, but was subject to review, and as we have heretofore said, we regard this a correct interpretation of the contract.

The instructions, as a whole, presented the law as favorably to the defendant as he could expect or desire, and in this regard he has no just ground of complaint.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

JOHN A. CRAIN *et al.*

v.

THE FIRST NATIONAL BANK OF JACKSONVILLE.

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Filed at Springfield September 23, 1885.

1. BANK OFFICERS—AGENCY—EVIDENCE—*question of authority of a cashier to bind the bank—custom of banks to borrow money.* In a suit against a firm of private bankers, upon a note given by their clerk and cashier for money borrowed by him in the firm name and appropriated to his own use, in which the cashier's authority to give the note is put in issue, evidence of the custom of bankers at the place in which the defendants' bank was located, to borrow money on time, is proper, as tending to show that the borrowing of money was within the scope of the ordinary and customary business of the defendants.

2. SAME—*a paper given to a third party containing the signatures of those authorized to bind the defendant bank—as evidence of their authority.* In the same suit it was *held*, a paper, directed to another and distant bank, giving the signatures of persons authorized to sign for the defendants, one of which was in the hand-writing of the cashier and another that of one of the defendants, was proper evidence as an admission of the defendant signing the same, of the cashier's authority to bind the defendants by the execution of a note in their firm name. And the fact that the payee of the note did not act on the faith of such paper, though detracting from its weight, did not render it irrelevant and improper.

3. SAME—*as to prior fraudulent acts of cashier with others.* In a suit upon such a note, proof of other fraudulent drafts drawn by the cashier upon other banks is not admissible, without any attempt to show knowledge of such drafts by the payee before making the loan to the cashier.

4. SAME—*giving of notes belonging to the bank as collateral for the cashier's loan, whether notice of cashier's want of authority in the particular transaction.* The giving as collateral security, by a cashier of a private bank, notes of other persons, of over $5000, of his bank, to secure a note of that amount given by him in the name of his principals, with authority, on maturity of the latter note, to sell the collaterals at public or private sale, with or without notice, and apply the proceeds to the payment of the note given, is not of such a nature as to afford notice to the party making the loan and taking the notes, of the cashier's want of authority to execute the note for the bank, or of fraud in giving it.

5. SAME—*as to general operations of the bank, and the cashier's connection with them, as showing his authority—an instruction on that question.* In a suit by A against C & D, private bankers, upon a note given by

the cashier of the bank in the firm name of the defendants, in which the cashier's authority was put in issue, the court instructed the jury, that if they believed, from the evidence, that the defendants were bankers at W., and that the person making the note was their cashier, and intrusted by them with the general management of their bank and the power to carry on all their general banking operations, and that it was one of the usual operations of a bank at W. and its vicinity to borrow money on time and execute a note therefor, and that such person, while acting as cashier and manager for the defendants, borrowed in their name, of the plaintiff, $5000, and thereupon executed and delivered to the plaintiff the note sued on, they should find for the plaintiff: *Held*, that the instruction was properly given, and that it was not faulty in not defining the meaning of "general manager," or what constituted general management, or in ignoring the question of notice of the agent's want of authority, when there was no sufficient evidence of such notice.

6. SAME—*holding out agent as having authority to act.* On an issue as to an agent's authority to borrow money, and give a note therefor, in the name of his principal, the court modified an instruction of defendant, that when an agent acts beyond his authority the principal is not bound, unless he had held out to the party dealt with, the agent as having authority to do the act, by adding after the words "dealt with," and before the words "the agent," the words, "or to the public generally:" *Held*, that there was no error in the modification.

7. GENERAL AGENT—*what constitutes.* Power to act generally in a particular business, or a particular course of trade in a business, however limited, constitutes a general agency, if the agent is so held out to the world, however restricted his private instructions may be.

8. ACTION—*as to principal debt—effect of being secured by collaterals.* The fact that payment of a promissory note is secured by collaterals, does not affect the right of recovery in an action on the note.

9. INSTRUCTION—*singling out a particular fact.* In a suit upon a note given by an agent, the court was asked to instruct the jury that the fact that defendants authorized the agent to sign their firm name to notes, to a certain firm named, or to others, did not of itself authorize him to sign their name to the note sued on,—which was refused: *Held*, that the instruction was bad in singling out a particular fact, and telling the jury that such, alone, would not warrant a recovery.

10. ERROR—*when obviated by the answer to the question ruled out.* The refusal of a proper question can not be assigned as error when the witness, notwithstanding the ruling of the court, substantially answers the same.

11. ERROR WILL NOT ALWAYS REVERSE—*refusal of instruction.* The refusal of a proper instruction in respect to certain evidence will not be such material error as to require a reversal, when, from all the evidence, the finding must have been the same had it been given.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for the appellants:

A general agent is one who is authorized by his principal to take charge of his business in a particular line. Wharton on Agency, sec. 117; *Doan* v. *Duncan*, 17 Ill. 272; 18 id. 96; *Potter* v. *Dennison*, 5 Gilm. 590.

Over the objection of appellants, both Mr. Ayers and Mr. Farrell were permitted to prove the custom of banks, in Waverly, to borrow money on time. We insist this was not material, and at the same time it was calculated to mislead. The court made it the basis of instruction. It was not a question whether banks were accustomed to borrow money on time, but whether clerks in like situations were, by custom, authorized to negotiate loans of the character in question, and to bind their employers by promissory notes,—and nothing of the kind appeared.

The plaintiff introduced a paper, as follows: "Herewith please find signatures of persons authorized to sign for Crain & Manson,"—with the firm name written three times, one of which was in the hand-writing of W. O. Manson. This not being addressed to plaintiff, and not acted on by it, was improperly admitted, or if admitted, should have been controlled by instructions.

The facts and circumstances were such as to put the plaintiff upon its guard, and require its officers to investigate the agent's authority. *Potter* v. *Dennison*, 5 Gilm. 590.

As to what will amount to a notice, see *Rodrigues* v. *Hefernan*, 5 Johns. Ch. 417.

Notice to the cashier of a bank is notice to the bank. *Loring* v. *Brodie*, 134 Mass. 453; *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 292.

As to the implied authority of a clerk, see *Doan* v. *Duncan*, 18 Ill. 97; Story on Agency, secs. 88, 89; *Craighead* v. *Peterson*, 72 N. Y. 279; *Hodge* v. *Combs*, 1 Black, 192.

A cashier of a bank can not, by his own action, impose on the bank any liability not already imposed by law or usage, (Wharton on Agency, sec. 687, note 3,) nor create any agency, (*United States* v. *City Bank*, 21 How. 356,) nor sell or mortgage its property. *Leggett* v. *Manufacturing Co.* 1 N. J. Eq. 441.

As to inference of authority to do one act from authority to do another, see *Thompson* v. *Elliott*, 73 Ill. 221; *Melvin* v. *Insurance Co.* 80 id. 446; *Padfield* v. *Green*, 85 id. 529; *Reynolds* v. *Ferree*, 86 id. 570; *Iron Mining Co.* v. *Bank*, 44 Mich. 344.

It has been insisted that Crain & Manson held out W. O. Manson as their agent having these powers, and having done so, and the appellee having lost its money thereby, appellants must make good the loss. This is not sound, for two reasons:

First—Because appellee did not make the loan by reason of the fact that W. O. Manson was so held out as agent. He acted on the presumption that the letter received was the letter of Crain & Manson. He made no inquiry, and did not know the supposed agent. Appellee can not maintain the position. *Thompson* v. *First Nat. Bank*, 111 U. S. 529; *Norton* v. *Richmond*, 93 Ill. 373.

Second—The officers of appellee did not act in good faith. As we have before remarked, the facts and circumstances required the bank to take notice, which it failed to do. A party, in order to hold another bound by the supposed acts of the agent, must act in good faith, and if he has notice before acting, he can not then act in good faith. *Iron Mining Co.* v. *Bank*, 44 Mich. 344.

If the inquiry had been made, the fraud would have been discovered. The facts charge the bank with notice of all the

knowledge its officers might have ascertained, and "a principal is not bound by a contract which is a fraud on him, and is known so to be by the person entering into the contract." 1 Lindley on Partnership, 299.

Messrs. BROWN & KIRBY, and Messrs. SPRINGER & DUMMER, for the appellee:

The question as to who had general charge of the establishment, was fully answered, and called for the conclusion of the witness.

The modification of appellants' sixth instruction, by inserting the words, "or to the public generally," is warranted by *Thompson* v. *National Bank*, 111 Ill. 537.

Their third instruction was properly refused, as not giving a correct definition of a general agent. *Noble* v. *Nugent*, 89 Ill. 522; *Insurance Co.* v. *Advance Co.* 80 id. 549; *Doan* v. *Duncan*, 17 id. 272.

When one of two innocent parties must lose from the dishonesty of a third, that one shall bear the loss who by his negligence has enabled the third to occasion it. *Merchants' Bank* v. *State Bank*, 10 Wall. 604; *Bank of United States* v. *Davis*, 2 Hill, 465; *Holmes* v. *Trumper*, 22 Mich. 427; *Farmers' Bank* v. *Butchers' Bank*, 16 N. Y. 133; *New York County* v. *Schuyler*, 34 id. 30; *Canal Co.* v. *Hathaway*, 8 Wend. 488.

Though limited by his employment to the banking business of Crain & Manson, William O. Manson was their general agent. Story on Agency, sec. 22; *Noble* v. *Nugent*, 89 Ill. 524.

The principal is liable for the acts of his general agent within the scope of his authority, although he may exceed his instructions. *Noble* v. *Nugent*, 89 Ill. 594; *Insurance Co.* v. *Advance Co.* 80 id. 549; *Harris* v. *Simmerman*, 81 id. 413; *Chicago Ry. Co.* v. *McMahon*, 103 id. 485; *Anderson* v. *Conley*, 21 Wend. 279.

Private instructions not to give notes to any but regular correspondents, are not binding on the public. *Packet Co.* v. *Parker*, 59 Ill. 23.

The public is not bound to inquire into the authority of the bank officer. By putting him in the position they accredit him to the public. *Munn* v. *Burch*, 25 Ill. 41; *Noble* v. *Cunningham*, 74 id. 51; *Ryan* v. *Dunlap*, 17 id. 45; Story on Agency, secs. 52-56.

William O. Manson being permitted to act as the manager of their bank, he was, as to the public, possessed of all the powers incident to such a position, notwithstanding private instructions narrowing his authority. Story on Agency, secs. 105, 106.

Whether William O. Manson was, of right, the manager of the bank, or mere clerk, he was *de facto* its cashier, and the bank was bound by his acts as such. *Bank of United States* v. *Dandridge*, 12 Wheat. 64; *Minor* v. *Mechanics' Bank*, 1 Pet. 46.

The limitation of the authority of William O. Manson, if assumed, did not affect those to whom the limitation was unknown. *Commercial Bank* v. *Norton*, 1 Hill, 501; *Bank of Vergenes* v. *Warner*, 7 id. 501; *Beers* v. *Phœnix Glass Co.* 14 Barb. 358; *Farmers' Bank* v. *Butchers' Bank*, 14 N. Y. 624; *Barnes* v. *Ontario Bank*, 19 id. 156.

By virtue of his position, William O. Manson had the power to bind the bank to this loan, and the defence that he intended to apply it to his own use does not affect the National bank, without proof that that bank knew of his purpose to do so. *Barnes* v. *Ontario Bank*, 19 N. Y. 152.

The position of appellants, that since William O. Manson applied the money to his own use, or filled with it a vacancy which he had created in the funds of Crain & Manson, is effectually disposed of in *Barnes* v. *Ontario Bank*, 19 N. Y. 152.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit by the First National Bank of Jacksonville, against John A. Crain and James W. Manson, upon a promissory note purporting to be made by Crain & Manson to the plaintiff, for $5000, dated at Jacksonville, Illinois, May 8, 1883, and payable four months after date, with eight per cent per annum interest after maturity. The plaintiff recovered in the circuit court a verdict and judgment for $5303.33, which judgment, on appeal to the Appellate Court for the Third District, was affirmed, and the defendants appealed further to this court.

The defendants' plea put in issue the execution of the note. It appears from the evidence, that the defendants, under the firm name of Crain & Manson, were retail merchants at Waverly, Illinois, and had been for a good many years, and for a number of years prior to the date of the note they were also private bankers, having a bank of deposit. Both the banking and goods departments were conducted in the same room. James W. Manson gave his personal attention to the business of the firm, Crain not being all the time an active man in the business, but both partners continuing a general supervision over the business of the firm. William O. Manson was a son of James W. Manson, and was employed as a clerk or cashier, having no interest, but working on a salary. He kept the books of both departments, and more generally attended to the banking department. He drew sight drafts, received deposits, issued certificates of deposit, and wrote letters for the firm. The firm had as correspondents, with whom accounts were kept, M. P. Ayers & Co., Jacksonville, and a house in each of the cities of St. Louis, Springfield, Chicago and New York. William O. Manson had authority to use the firm name at these particular places, and to sign the firm name to notes in the transaction of business at these banks, but not elsewhere. Defendants had never kept any

account with the First National Bank of Jacksonville, nor authorized William O. Manson specially to negotiate any loan there, nor had they any knowledge of his having done so till long after the firm dissolved,—August 23, 1883. The signature of the name of Crain & Manson to the note in suit was in the hand-writing of William O. Manson, and the note was given for money borrowed from the bank.

It is assigned for error that the circuit court erred in sustaining the plaintiff's objection to the following questions put to James W. Manson, one of the defendants, by his own counsel: "Was the banking department exclusively under the control of any one?"—"Who had general charge of the establishment, if any one?" Notwithstanding the objection was sustained, the witness appears to have answered, substantially, both questions,—as to the first, saying: "Banking was under control of defendants, as was the merchandising. W. O. Manson was hired to attend to that. He was some times away, but not long at a time." And to the second: "Both partners attended to the bank when it was necessary; we thought we had a good clerk in W. O. Manson for that; I often received deposits and paid out money and drew drafts; Mr. Crain generally left it to myself and son; firm had other clerks; we thought it was all right; no other clerk in banking department."

Objection is made to the admission of proof of the custom of banks in Waverly to borrow money on time. We think this was proper testimony, as tending to show that the borrowing of money was within the scope of the ordinary and customary business of the defendants.

Another question raised on the admissibility of evidence offered by the plaintiff, is as to the following paper, which the court permitted to be read to the jury:

"WAVERLY, ILL., *April, 1883.*

"Herewith please find signatures of persons authorized to sign for Crain & Manson:"

—With the firm name written three times, the first being in the hand-writing of William O. Manson, and the second in that of James W. Manson. The paper was properly admitted as an admission of James W. Manson, one of the defendants. It is said this paper was not furnished to the plaintiff, and it did not act upon the faith of the paper; that defendants' commenced business with the Commercial National Bank of Chicago about May 1, 1883, and that this was a private paper, which was forwarded to that bank in a letter, for its guidance alone. All this might have detracted from the force of the paper as an admission, and rendered it of but little weight; but still it can not be said to have been evidence which was irrelevant and erroneously admitted.

The refusal of the court to permit proof of other fraudulent drafts drawn by William O. Manson in the name of the defendants, upon their correspondents in St. Louis, which is complained of by defendants, was proper. There being no attempt to bring knowledge of such drafts to the plaintiff, they were irrelevant as evidence in this suit.

Appellants complain of instructions Nos. 1, 2 and 5, given for the plaintiff. Numbers 1 and 5 were substantially alike, being to the purport that if the jury believed, from the evidence, that the defendants, Crain & Manson, were bankers at Waverly, Illinois, and that William O. Manson was their cashier, and intrusted by them with the general management of their bank, and the power to carry on all their general banking operations, and that it was one of the usual operations of a bank in Waverly and its vicinity to borrow money on time, and execute a note therefor, and that said William O. Manson, while so acting as cashier and manager for the defendants, borrowed in their name from the plaintiff the sum of $5000, and thereupon executed and delivered to the plaintiff the promissory note in evidence, then the verdict of the jury should be for the plaintiff, even though the said sum was appropriated by said William O. Manson to his own use. The

criticism made upon these instructions is, that they ignore the question of notice to plaintiff of sufficient facts to put it on guard and make inquiry as to the authority of William O. Manson to execute the note, and that the instruction was faulty in not defining the meaning of "general manager," or what constituted "general management." We do not think there was enough of evidence of such notice to have required the making of any reference to it in the instruction. All that is relied upon as tending to show any such notice, is the fact that at the time of the giving of the note there were delivered over several promissory notes of other persons, of over $5000 in amount, as collateral security, with authority, on maturity of the note given, to sell the collaterals at public or private sale, and without notice, and apply the proceeds to the payment of the note given. This may have been a transaction of a somewhat extraordinary character in its details, but it was all for the better securing of the payment of the note, and did not point to want of authority to execute the note, or to fraud in the giving of it. In the giving of such an instruction there was no occasion for defining what constituted a "general manager," or "general management." It was open to the defendants to have asked any instructions in that regard which they might have thought necessary. As propositions of law, we perceive no error in the instructions.

There is plainly no ground of complaint as to the second instruction, which was to the effect that the fact of the note being secured by collaterals did not affect the right of recovery.

Complaint is made of the modification by the court of defendants' sixth instruction. As modified, it was, in substance, that when an agent acts beyond his authority, the principal is not bound, unless he had held out to the party dealt with, *or to the public generally*, the agent as having authority to do the act,—the modification consisting of the insertion of the words

in italics. The case cited by appellants' counsel (*Thompson* v. *First National Bank*, 111 U. S. 537,) as against such modication, seems to lend somewhat of countenance thereto, in its being there said: "There may be cases in which the holding out (as a partner) has been so public and so long continued that the jury may infer that one dealing with the partnership knew it, and relied upon it, without direct testimony to that effect." As asked, the instruction was erroneous in ignoring any holding out to the public. Such holding out, here, might have been to the extent above indicated, and the instruction was properly enough modified so as to recognize that element of holding out to the public. The modification might have been made more full by laying down to what extent the "holding out" must have been; but we are not prepared to say there was error in this regard. Had the defendants desired a more full instruction in that respect, it was open to defendants to have asked it.

The third instruction asked by defendants, "that a general agent is defined to be one who has authority to transact all the business of his employer," was properly refused. Power to act generally in a particular business or a particular course of trade in a business, however limited, would constitute a general agency, if the agent is so held out to the world, however so restricted his private instructions may be. *Doan* v. *Duncan*, 17 Ill. 272; Story on Agency, sec. 17.

Defendants' tenth refused instruction respected the question of notice, remarked upon in passing upon the first and fifth instructions for the plaintiff, and what was there said sufficiently disposes of the objection in not giving this tenth instruction.

Defendants' fifteenth refused instruction was, that the fact that defendants authorized William O. Manson to sign their name to notes to the firm of M. P. Ayers & Co., or to other correspondents, would not of itself authorize said William O. Manson to sign the name of defendants to the note in suit,

was objectionable in singling out a particular fact, and telling the jury that such alone would not warrant a recovery.

Defendants' sixteenth refused instruction, though somewhat exposed to the same objection as the last, and claimed by appellants to be equally faulty, we think to be distinguishable, and that it should have been given. It was in reference to the paper which has been before mentioned, and set out as having been given by defendants to the Commercial National Bank of Chicago,—that the furnishing of that paper to that bank would not of itself confer authority upon William O. Manson to execute to the plaintiff the note sued on. The paper purported on its face to give the signatures of persons who were authorized to sign for Crain & Manson, and it was without limit. The paper was extremely liable to mislead the jury to think that the authority was unlimited to sign the name of Crain & Manson not only at that, the Commercial Bank, but at any other bank; and to guard against the jury being thus misled, the instruction was a very proper one. Yet there was such a weight of evidence, besides, of the holding out by defendants of William O. Manson as possessing authority to borrow money and execute notes in their name, that we can not think the not giving of this instruction was of any harm to defendants, and that it was a material error.

The refusal to give the seventeenth instruction asked by defendants was manifestly correct.

We find no material error in the record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

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FRONA ANN RANSOM

v.

SAMUEL E. HENDERSON *et al.*

Filed at Springfield September 23, 1885.

1. TAX TITLE—*whether a precept must be shown in support of a tax deed—since the amendment of 1879.* Prior to the amendment of the Revenue law of 1879, the failure to produce in evidence a precept, was fatal to a tax title; but since that amendment, making the tax deed *prima facie* evidence of the regularity of the proceedings, it is not necessary, in the first instance, for the party claiming title under the tax sale to produce such precept. It is sufficient that he gives in evidence his tax deed.

2. The production of a tax deed regular on its face, affords *prima facie* evidence "that the sale was conducted in the manner required by law;" but such *prima facie* case may be rebutted by evidence showing there was in fact no valid precept, or that the sale was not conducted according to law.

3. PRACTICE IN THE SUPREME COURT—*considering ruling affecting interests of parties not complaining.* On the appeal of one of several defendants, only, from a decree in partition, this court may refuse to consider a ruling as to the interests of other defendants not joining in the appeal and taking no steps to have the decree as to them reversed. A party can not assign for error that which does not prejudice his or her rights.

APPEAL from the Circuit Court of Brown county; the Hon. ASA C. MATTHEWS, Judge, presiding.

Mr. WILLIAM L. VANDEVENTER, for the appellant:

Appellees' rights, except as to one-seventh derived from Mrs. Masterson, are claimed under a tax sale, and no precept of sale appears in the evidence. Without it the sale is void. *Bell* v. *Johnson*, 111 Ill. 374; *Eagan* v. *Connelly*, 107 id. 459; *Gage* v. *Lightburn*, 93 id. 249; *Williams* v. *Underhill*, 58 id. 137; *Holbrook* v. *Dickinson*, 46 id. 285; *Hinman* v. *Pope*, 1 Gilm. 131.

Mr. WILLIAM H. BARNES, and Mr. O. P. THOMPSON, for the appellees:

A party will not be permitted to question a transaction which in no way affects his interests. *Manufacturing Co.* v.

Cady, 96 Ill. 430; *Willemin* v. *Dunn*, 93 id. 511; *Robinson* v. *Brown*, 82 id. 281; *Greenman* v. *Harvey*, 53 id. 390.

The tax sale was fully sustained. The act of 1879, (Rev. Stat. sec. 224,) enacts that tax deeds shall be *prima facie* evidence,—first, that the lands were subject to taxation, and had been listed and assessed properly; second, that the taxes were not paid; third, that the lands were not redeemed; fourth, that the lands were properly advertised; fifth, that the lands were sold for taxes, as stated; sixth, that the grantee was the purchaser, or his assignee; seventh, that the sale was conducted in the manner required by law, and that the judgment shall estop all parties from raising any objection thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defence, etc.; and the judgment shall be conclusive evidence of its regularity and validity in all collateral proceedings.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a proceeding for partition, prosecuted by Samuel E. Henderson, Owen P. Thompson and William H. Barnes, against Hiram E. Henry, Robert Ransom and Frona Ann Ransom and others, in the circuit court of Brown county. The substantial allegations of the bill are, the lands of which partition is sought originally belonged to Jesse Orr, who died intestate on the 1st of January, 1876, leaving surviving him a widow and seven children, namely, Sarah E. Masterson, John Orr, Lorano Caroline Orr, Susan Orr, Elliott Orr, Julia Orr and Mary Orr; that John, Elliott and Julia subsequently conveyed their respective interests in the tract, and the widow relinquished her right of dower in the interests so conveyed, to Hiram E. Henry, Robert Ransom and Frona Ann Ransom, as tenants in common; that after such conveyance, the complainants, as tenants in common, purchased and became the

owners of the respective interests of Sarah E. Masterson, Susan Orr and Mary Orr, leaving one-seventh interest owned by Lorano Caroline Orr. Proper parties are made defendants, and brought before the court. Hiram E. Henry and Robert and Frona Ann Ransom answered, jointly and severally, among other things denying that they are seized of only the parts or interests in the premises as alleged in the bill, and also denying that complainants, or either of them, have or has any right, title, interest or estate in the premises. They allege that Frona Ann Ransom acquired and owns six-sevenths of the premises, and that some person other than either of the complainants owns the other seventh. The other defendants failed to answer, and decree was rendered against them *pro confesso*. The court, on final hearing, found that the complainants, each, was the owner in fee of an undivided one-seventh, and that the defendant Frona Ann Ransom is entitled to an undivided four-sevenths of the premises, and commissioners were appointed to make partition accordingly. The commissioners reported, at a subsequent day, that the lands were insusceptible of partition, and thereupon the court decreed that they be sold, and that the proceeds be divided and paid over in accordance with the several interests as previously found, etc.

The evidence introduced upon the hearing proves the ownership of Jesse Orr in his lifetime, his death, and that his surviving children and only heirs-at-law were as alleged in the bill; that Frona Ann Ransom has conveyances of the interests of Susan, Mary C., Lorano C. and Elliott, and that Sarah Masterson conveyed by deed to complainants. Complainants claim the interests, and the claim was sustained by the circuit court, of John and Julia, by virtue of a judgment and sale for taxes, and a deed thereunder, purporting to convey their interests. The only question discussed upon the record is, whether the evidence is sufficient to justify the decree as to those two interests. But the only parties adversely

affected by the ruling,—namely, John and Julia,—are not before us. They have assigned no errors upon this record, and have taken no steps to reverse the decree below. Frona Ann Ransom, who alone appeals, makes no pretence, by her proofs, of ownership of their interests. Her answer, not under oath, was but a pleading, putting in issue the allegations of the petition. (*Jones* v. *Neely*, 72 Ill. 449; *Willis* v. *Henderson*, 4 Scam. 13.) The evidence shows that she entered into possession having title to a certain undivided interest, and fails to show a disseizin of her co-tenants, or any attempt to disseize them; and the law, therefore, construes her possession as being under and by virtue of the title she is proven to have had, and in maintenance of the rights of all the tenants. (Freeman on Co-tenancy, sec. 166; *Busch* v. *Huston*, 75 Ill. 344; *Ball et al.* v. *Palmer*, 81 id. 370.) She gets her full distributive share of the proceeds of the sale of the property under the decree, and whether other shares to which she is not entitled are paid over to the right parties or not, can not concern her. The principle is of familiar application that a party can not assign for error that which does not prejudice his or her rights. *Greenman* v. *Harvey*, 53 Ill. 390; *Robinson* v. *Brown*, 82 id. 281; *Willemin* v. *Dunn*, 93 id. 511; *Manufacturing Co.* v. *Cady*, 96 id. 430.

But we may go further, and sustain the decree upon the hypothesis that this question is properly before us. The judgment was for the taxes due for the year 1879. A record of the judgment, and sale thereunder, a copy of the affidavit made for the purpose of obtaining a tax deed, and a tax deed in due and regular form of law, were read in evidence, without any objection being interposed against the competency or sufficiency of the evidence at the time,—at all events, the record discloses no such objection.

Section 224 of the Revenue law, in force when this sale was made, (2 Starr & Curtiss, 2101,) makes tax deeds, like that here read in evidence, *prima facie* evidence in all con-

troversies and suits in relation to the right of the purchaser, his heirs or assigns, to the real estate thereby conveyed, of seven distinct, specified facts, among which are, "that the real estate was sold for taxes or special assessments, as stated in the deed," and "that the sale was conducted in the manner required by law." Very clearly, if the sale was not conducted in the manner required by section 194 of the same chapter, which prescribes the record which shall authorize the sale, it was not conducted in "the manner required by law;" and, conversely, if it was conducted in the manner required by law, it was conducted as required by said section 194, and so it must follow that the tax deed itself was *prima facie* evidence that the sale was conducted in the manner required by that section.

The objection now urged is, that the evidence introduced failed to show compliance with said section 194,—in other words, the existence of a precept authorizing the sale. The reading of the deed in evidence, alone, by the petitioners, would have made a *prima facie* case in their behalf, and the burden would then have been on the defendants to have disproved that *prima facie* case. They were under no obligation, in the first instance, to have introduced any other evidence; but, having unnecessarily introduced some evidence of the proceedings anterior to the sale, may it be said they have waived the *prima facie* case made by the introduction of the deed? We think not, especially as no objection was made, at the time, to the sufficiency of this evidence or the admissibility in evidence of the tax deed. Had the objection now urged been urged at the time, the petitioners might, for aught that appears in this record, have obtained and introduced the evidence claimed to be wanting. It now comes too late. (*Daniels* v. *Burso*, 40 Ill. 307; *Hyde* v. *Heath*, 75 id. 381.) *Bell* v. *Johnson*, 111 Ill. 374, was totally unlike the present case. There, the proceeding was to set aside the tax deed as a nullity, because there was no precept. The complainants

affirmatively introduced what was claimed to be all the record evidence, and no precept was included. It was then incumbent on the defendant to introduce other proof of the precept if such evidence was in existence, and no such evidence being introduced, it was concluded there was none. The *prima facie* case made by the introduction of the tax deed was overcome. There was no question as to the admissibility of evidence, or of waiver, by reason of failure to object to the introduction of evidence.

We have made some changes in the argument in this opinion, but none in the rulings, since considering the able petition for rehearing filed herein. We perceive no reason to change from our former conclusion, and the decree is therefore affirmed, and the petition for rehearing denied.

Decree affirmed.

THE NATIONAL BENEFIT ASSOCIATION

v.

LOUISA JACKSON.

114 533
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Filed at Springfield September 23, 1885.

1. INSURANCE—*waiver of cash payment of premium and dues by taking an order—notice.* An insurance company has the right to waive a cash payment of the premium and dues required in the policy, and accept in lieu thereof an order for the same, given by the assured on a third person; and when it does so, and gives a receipt for the amount, it can not defeat a recovery upon the policy, and insist upon a forfeiture as for non-payment of the premium and dues, without having given the assured notice of the non-payment of the order. Such a case differs from one where the assured gives his promissory note for the premium, which he fails to pay when due, and in which the policy provides for a forfeiture for non-payment of the note.

2. SAME—*accident insurance—death from accident while engaged in the discharge of duty—voluntary exposure.* Where a party insured against injuries effected through external, violent and accidental means, receives an injury while in the discharge of his regular duties as yard-switchman or brakeman of a railway company, from which he dies, a recovery can not be

defeated on the ground of voluntary exposure to danger, when the accident is one contemplated by the parties to the insurance.

3. AMENDMENT—*as to capacity in which plaintiff sues.* The widow of a person insured against accidents, improperly brought suit upon the policy or certificate in her name, as administratrix, the policy being made payable to her. Before the trial she amended her declaration, by leave of court, by striking out the word "administratrix," after her name. Thereupon the defendant moved to strike the declaration from the files, because of a variance from the summons, and the court then allowed an amendment of the writ and all other papers, so that they might correspond: *Held*, that the amendments allowed were fully authorized by section 24 of the Practice act.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

Mr. JAMES BUCHANAN, and Messrs. GERE & BEARDSLEY, for the appellant:

The court erred in allowing motions of plaintiff to strike out of the declaration and writ the word "administratrix," etc., and in overruling defendant's motion to strike the declaration from the files. Section 24 of the Practice act does not authorize such a radical change in the parties to a suit. This court has held that the statute does not allow the substitution of one plaintiff for another.

The order for $5.20, the "binding receipt," and the certificate of membership, were concurrent, mutual contracts, and the failure to pay the order according to its terms forfeited all rights of the assured.

If a policy of insurance by its terms is forfeitable for non-payment of premium, or any note given therefor, when due, a failure to pay such note at maturity, or any part thereof, works a forfeiture, and no notice of non-payment is required. May on Insurance, sec. 341; *Pitt* v. *Insurance Co.* 100 Mass. 500; *Caton* v. *Insurance Co.* 33 N. J. 487; *Baker* v. *Insurance Co.* 43 N. Y. 283; *Gorton* v. *Insurance Co.* 39 Wis. 121; *Joliffe* v. *Insurance Co.* 39 id. 111; *Wall* v. *Insurance Co.* 36 N. Y. 157; *Hammond* v. *Insurance Co.* 10 Gray, 306; *Patch*

v. *Insurance Co.* 44 Vt. 481; *Williams* v. *Insurance Co.* 19 Mich. 491; *Watrous* v. *Insurance Co.* 35 Iowa, 582; *Insurance Co.* v. *McMillen,* 24 Ohio St. 67; *Ferebee* v. *Insurance Co.* 68 N. C. 11; *Insurance Co.* v. *Reese,* 8 Ga. 584; *Tarleton* v. *Stainforth,* 5 T. R. 695; *Want* v. *Blunt,* 12 East, 183.

The circumstances which occasioned Jackson's death were not such as would render the association liable had Jackson been a member. The certificate contains this clause: "No claim shall be made under this certificate when death happens in consequence of any voluntary exposure to unnecessary danger." *Tuttle* v. *Insurance Co.* 134 Mass. 175.

Mr. J. L. RAY, for the appellee:

The court was right in permitting the amendment to be made by dropping the word "administratrix," etc., and proceeding in the name of Louisa Jackson. *Insurance Co.* v. *Mueller,* 77 Ill. 22.

The recital of the policy that the admission fee and two advance assessments had been paid, can not be contradicted. The association is estopped from proving such fact. *Insurance Co.* v. *Mueller,* 77 Ill. 22.

They can not cancel a policy for non-payment of order, or any other thing, when the same moneys are, by the policy or certificate of membership, acknowledged to have been paid, on grounds of public policy. *Insurance Co.* v. *Anderson,* 77 Ill. 384.

This association took orders on the railroad company paymaster in payment for this insurance, and they must look alone to the railroad company for payment, (*Insurance Co.* v. *Mueller,* 77 Ill. 22,) and it makes no difference whether the order was paid or not.

Jackson was killed while following his regular business in the line of his duty. But even if he were not, it would make no difference under this policy. *Insurance Co.* v. *Fennell,* 49 Ill. 180; 32 id. 223; *Insurance Co.* v. *Wolfe,* 37 id. 354.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought in the name of Louisa Jackson, administratrix of the estate of Joseph Jackson, deceased, against the National Benefit Association, on a policy of insurance issued by the association, under which Jackson was insured against injuries from accident.

Before the trial of the cause the court allowed the plaintiff to amend her declaration by striking out the word "administratrix." After the amendment the defendant entered a motion to strike from the files the declaration, because of a variance between it and the summons. At the same time the plaintiff asked leave to amend the writ, and all other papers in the case, in order that they might correspond. This motion the court allowed, and overruled defendant's motion. The amendments allowed by the court were fully authorized by section 24 of the act in relation to Practice. Rev. Stat. 1874, page 778.

It is claimed that the admission fee of $8, and two assessments, of $1.60 each, were not paid, and in consequence of the non-payment the policy became void. The application, which was signed by Jackson, contained the agreement that he should pay, on becoming a member of the association, an admission fee of $8, and two assessments, of $1.60 each,—total, $11.20. The certificate or policy issued to Jackson, contained, among other things, the following:

"The National Benefit Association, in consideration of representations, agreements and warrantees, and of the admission fee of $8, and $3.20, being for two advance assessments paid, the receipt whereof is hereby acknowledged, and the agreement to pay $4 annual dues before twelve o'clock on the first day of January of each year, and the further sum of $1.60 for each benefit assessment in manner required by the board, does issue this certificate to Joseph Jackson. The sum to be paid is not to exceed $1000, and to be paid

to Mrs. L. S. Jackson, or his legal representatives, within ninety days after satisfactory proofs that said member has sustained, during the continuance of membership, bodily injuries effected through external, violent and accidental means. * * * The member agrees to pay the dues above specified. All payments to be made at the home office of said association. No delivery of this certificate shall be of any validity whatever, unless the holder of the same shall have previously paid the first payment, as specified in his application, or shall pay, or secure the payment thereof, at the time of such delivery. The holder agrees and accepts the same upon express condition that if either dues or assessments are not paid to the association within the time limited, then this certificate shall become null and void, and of no effect."

The sum of $11.20 required to be paid to make the policy valid between the parties, was not paid in money at the time the policy was issued and delivered; but Jackson, who was then an employe of the Indiana, Bloomington and Western Railroad Company, gave to the association, in payment of the amount, two orders on the paymaster of the railroad company,—one for $6, and the other for $5.20. The first was payable out of his March time, and was duly paid when due. The second was dated March 21, 1882, and read substantially as follows:

"*To J. F. Allen, Paymaster, I., B. and W. Ry. Co.:*

"Please pay the National Benefit Association * * * $5.20 out of my wages for the month of April, 1882.

JOSEPH JACKSON."

This order was presented to the paymaster, but was subsequently returned by him, with the statement that Jackson had "no time,"—which was a mistake of the paymaster. Under these facts it is insisted that the association was not liable on the certificate of membership, or policy, which had been delivered to the insured.

We have given this matter a careful consideration, and we are not able to concur in the view of appellant's counsel. The association had the right, if it saw proper, to waive a cash payment, and accept, in lieu of cash, the orders on the railroad company, and if these orders were taken as cash, then, although the association failed to collect one of them, that fact can not be held to defeat the policy. In the application which was prepared by the company and executed by Jackson, will be found the following statement: "If the number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid." The "above amount" named is the $11.20. The binding receipt which acknowledged the payment of $11.20, was executed by the association. No. 5364 was inserted therein, and delivered to Jackson. This receipt never would have been given unless the association treated and accepted the orders as cash. Indeed, all the facts bearing upon the question point to the fact that the orders were accepted as cash, and the association having accepted them as cash, it must be bound by that act. At all events, the association having accepted the orders as cash, when one of the orders was returned to it by the railroad company not paid, good faith required that Jackson should be notified of the non-payment of the order, and the association could not, on any principle of fair dealing, claim a forfeiture of the policy for non-payment without giving Jackson notice, which was never done. There is no similarity between this case and a case where a promissory note has been given for a premium due at a future day, and the policy provides that it may be forfeited for the non-payment of the note when due, and the authorities cited which sustain a forfeiture in such a case have no application to the facts of this case.

It is also insisted that Jackson's death was occasioned by voluntary exposure to unnecessary danger, and hence the company is not liable. From the evidence it is plain that

Syllabus.

Jackson was killed while in the discharge of his regular duty as yard-switchman or yard-brakeman, while handling broken cars, and his death arose, not from voluntary exposure, but from an accident, for which the contracting parties intended the association should be liable.

The decision of the Appellate Court will be affirmed.

Judgment affirmed.

THE PEOPLE *ex rel.* Eureka C. Storey

v.

JOSHUA C. KNICKERBOCKER, Probate Judge.

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Filed at Springfield September 23, 1885.

1. PROBATE OF WILL—*within what time—the statute construed as to probate "without delay."* The statute requiring the court to receive the probate of wills "without delay," is not to be construed so literally as to make it the duty of the court to proceed immediately in the probate of a will when presented. Its meaning is no more than that the court shall proceed without unreasonable delay.

2. SAME—*discretion of court as to time of hearing proof of will.* The probate court is invested with a reasonable discretion as to advancing or postponing cases, and may properly, in the exercise of such discretion, during the pendency of an appeal from its order refusing the probate of a paper purporting to be a last will, stay and postpone the hearing of an application to probate another paper of a prior date claimed as the will of the same person; and the exercise of such discretion, when not abused, will not be interfered with by *mandamus*. In such case the good faith of the party appealing from the order refusing probate is not a matter of inquiry.

3. SAME—*probate of will as a judicial act.* Under the present legislation, the probate court exercises a judicial, and not a mere ministerial, power, in the probating of a will, or in granting a motion for a postponement of the hearing of an application to admit a will to probate.

4. MANDAMUS—*as to matters involving discretion—of time of receiving probate of a will.* Where the exercise of a discretion is involved, a writ of *mandamus* will not be allowed agnist an inferior court or tribunal. So the discretion of the county or probate court as to the time it will receive probate of a will, or which of two papers purporting to be the wills of the same person, shall be passed upon first, will not be interfered with by this writ.

Statement of the case.

This was a petition in this court for a writ of *mandamus*, against the judge of the probate court of Cook county.

This is a petition for a *mandamus*, to the judge of the probate court of Cook county. An answer has been filed to the petition, to which the relatrix has interposed a demurrer. The facts appearing are, in brief, that the relatrix is the widow of Wilbur F Storey, deceased, late of the city of Chicago, who died on October 27, 1884, without issue, leaving Anson L. Storey, his brother, Mary E. Farrand, his sister, Mary E. Anderson and Edward P. Chapin, his niece and nephew, respectively, children of a deceased sister, his only next of kin. As is stated in the petition, he left a large estate, consisting of real estate in Cook county, improved, unimproved and in process of improvement, of the value of about $490,000, and the newspaper establishment from which is published the "Chicago Times," valued at $1,000,000, besides other personal property of small value, there being upon the real estate mortgages to the amount of $228,000, and debts of the estate in addition, amounting to $100,000.

The deceased left two writings, each of which purports to be his last will and testament. One bears date February 1, 1881, the other August 16, 1879. The former will was deposited in the probate court of Cook county on November 5, 1884. By this will of 1881, the relatrix is appointed sole executrix, without bonds, and as such is given authority to manage such estate, and to continue the publication of the "Chicago Times" until she shall find it practicable to make an advantageous sale thereof. The will further directs that the relatrix should, during her natural life or until her remarriage, have the use or interest of all the estate, or so much thereof as in her judgment she should need for her support and maintenance. When, however, the annual income of the estate shall be $12,000 or more, she is directed to pay to both said Mary E. Farrand and Anson L. Storey,

during his or her natural life, the sum of $1000 per annum. The will further directs that the income of the estate in excess of the amount so used by her for her support and maintenance, and to pay the above legacies, should be added to the *corpus* of the estate, which should, upon the relatrix's death or remarriage, descend to Mr. Storey's legal heirs. The relatrix is also empowered, as executrix, to sell or mortgage any part of the estate to pay debts, and is directed as soon as practicable to convert all the estate into interest-bearing securities. The will of August 16, 1879, was deposited in the probate court on November 11, 1884. This will also constitutes the relatrix the sole executrix, without bonds, and in its other provisions is substantially like the will of February 1, 1881, except that it does not, like the will of 1881, provide that the interest of relatrix shall cease upon her remarriage.

On November 5, 1884, and at the same time that the will of 1881 was deposited in the probate court, Anson L. Storey presented a petition, alleging that Wilbur F. Storey died intestate, and asking that letters of administration be issued to Austin L. Patterson. With the petition was presented a paper, signed by all the heirs-at-law, relinquishing all rights and preferences which either of them might have to administer, and requesting the appointment of Patterson. The petition for letters of administration was opposed by the relatrix, and she, on November 14, 1884, presented a petition asking the probate of the writing dated February 1, 1881. The court heard the testimony of the subscribing witnesses, and refused to admit the writing to probate as a will, for the reason that the testimony of the subscribing witnesses showed that Wilbur F. Storey was not of sound mind and memory at the time he signed the writing. From the judgment of the court the relatrix on the same day prayed an appeal, which was granted upon her filing an appeal bond within twenty days.

On December 2, 1884, Mary E. Farrand, the sister, prayed an appeal from the judgment, which was allowed on her filing

an appeal bond. On the same day, the relatrix filed her appeal bond, and Mrs. Farrand hers, both of which were approved. Subsequently each of the appellants procured a transcript of the record, and filed the same in the circuit court.

On December 22, 1884, the relatrix presented a petition to the probate court asking the probate of the writing bearing date August 16, 1879. An answer thereto, by Mrs. Farrand, was filed, which was verified by oath. No proof was received of the allegations of either petition or answer. There are some allegations in the petition as to the want of good faith of Mrs. Farrand in prosecuting her appeal, which are denied by her in the answer. Mrs. Farrand moved the court that the proceeding, and reception of proof, be postponed until the disposition of her appeal, or until the further order of the court. After the hearing of counsel the court made the following order:

"It is ordered that the prayer of the petition be refused at the present time, and that the taking of the testimony of the subscribing witnesses be postponed until the further order of this court, for the reason that the appeal of Mary E. Farrand from the order of this court, entered on the 14th day of November, 1884, refusing the probate of the writing of February 1, 1881, purporting to be the last will of Wilbur F. Storey, deceased, is still pending and undetermined in the circuit court of Cook county."

The prayer of the present petition is for a command to the judge to proceed and make a final order upon the probating of the will bearing date August 16, 1879.

Messrs. SWETT, HASKELL & GROSSCUP, for the petitioner:

When the will of August 16, 1879, was presented to the probate court, and an offer made to prove the same as required by law, it became the duty of that court to receive probate thereof without delay. Rev. Stat. 1874, chap. 148, secs. 2, 7.

That court has no power to name conditions other than those found in the statute. *Doran* v. *Mullen*, 78 Ill. 342.

Under the English chancery practice an appeal did not stay the execution of the decree appealed from, unless made so by a special order. Daniell's Ch. Pr. 1467.

Where the statute provides that an appeal shall supersede the decree, the decree remains intact, and its execution only is stayed until the appeal is heard. *Curtis* v. *Root*, 28 Ill. 367.

The stay is limited to the execution of the order appealed from. The order appealed from makes no reference to the prior will, and can not operate to stay proceedings to probate it. *Thompson* v. *Tracy*, 60 N. Y. 31.

Mandamus is the appropriate remedy to compel the probate judge to take action upon the will presented, and either to allow or disallow the same without delay. High on Ex. Legal Rem. sec. 152.

To proceed to trial is an executive duty, and may be enforced. *Costello* v. *St. Louis Circuit Court*, 28 Mo. 259; *Brem* v. *Arkansas County Court*, 9 Ark. 240; *Ex parte Cox*, 10 Mo. 742; *Ex parte Bradstreet*, 7 Pet. 634.

Where a cause is continued without a proper showing, *mandamus* lies to compel the court to proceed with the trial. *Dixon* v. *Field*, 10 Ark. 243; *People* v. *Pearson*, 1 Scam. 458; *People* v. *Jameson*, 40 Ill. 93.

Mandamus lies to compel all inferior tribunals to perform any duty enjoined on them by law, not involving judicial discretion. *Commonwealth* v. *Hampden*, 2 Pick. 414; *Springfield* v. *Hampden*, 4 id. 68; *Johnson* v. *Randall*, 7 Mass. 340; *Strong* v. *Petitioner*, 20 Pick. 484; *Carpenter* v. *Bristol*, 21 id. 258; *Nelson* v. *Justices*, 1 Coldw. 207.

Admitting a will to probate is a ministerial act. Rev. Stat. chap. 148, secs. 3, 7; *Manus* v. *Givens*, 7 Leigh, 689; *Dawson* v. *Thurston*, 2 Hen. & Munf. 132; *Delaney* v. *Goddin*, 12 Gratt. 266; *Mauer* v. *McCall*, 5 Ga. 522; *Williams* v. *Saund-*

ers, 5 Coldw. 60; Moses on Mandamus, 50; *City of Galena* v. *Amy*, 5 Wall. 708; *Ferguson* v. *Hunter*, 2 Gilm. 657.

MESSRS. TRUMBULL, WASHBURNE & ROBBINS, and MESSRS. DEXTER, HERRICK & ALLEN, also for the petitioner:

Where the probate court declines to proceed in the probate of a will, having no justifiable excuse therefor, *mandamus* lies to compel the court to act. 3 Redfield on Wills, *54; *Rex* v. *Raines*, 1 Ld. Raym. 361; *Justice* v. *Jones*, 1 Barn. K. B. 280.

The appeal of Mrs. Farrand from the order refusing probate of the will of 1881, is prosecuted in bad faith, and therefore should be no obstacle to the probate of the prior will.

The subsequent probate of the will of 1881 on the appeal, would authorize the court in revoking the probate of the prior will; but acts done before such revocation would be sustained. *Morgan* v. *Dodge*, 44 N. H. 258; *Goods of Harris*, 18 W. R. 901; *Bowen* v. *Johnson*, 5 R. I. 118; *Waters* v. *Stickney*, 12 Allen, 1; *Campbell* v. *Logan*, 2 Bradf. 92; *Schultz* v. *Schultz*, 10 Gratt. 358; *Patton's appeal*, 31 Pa. St. 465; 3 Redfield on Wills, *64; Rev. Stat. chap. 3, sec. 29.

Acts done under a will before its revocation, are valid. 3 Redfield on Wills, *120; *Allen* v. *Dundas*, 3 T. R. 125; *Appeal of Peebles*, 15 S. & R. 40; *Bigelow* v. *Bigelow*, 4 Ohio, 147; *Ragland* v. *Green*, 14 S. & M. 195; *Woods* v. *Nelson*, 9 B. Mon. 601; *Jones* v. *Jones*, 14 id. 379; *Price* v. *Nesbit*, 1 Hill, (S. C.) 445; *Waters* v. *Stickney*, 12 Allen, 1; *Ketterge* v. *Fulsom*, 8 N. H. 98.

Mandamus will not direct a court having judicial discretion, how to act, but will direct it to hear and finally dispose of the case. *People* v. *Dental Examiners*, 110 Ill. 185; *People* v. *McCormick*, 106 id. 188; *Rhodes* v. *Craig*, 21 Cal. 421; *People* v. *Scates*, 3 Scam. 351; *People* v. *Pearson*, 1 id. 461; *Avery* v. *Superior Court*, 57 Cal. 249; *Williams* v. *Saunders*, 5 Cold. 82; *Dunphey* v. *Belden*, 57 Cal. 458.

Brief for the Respondent.

Mr. W. C. GOUDY, for the respondent:

Under the present laws, and since the act of 1849, the probate of a will is a judicial act. But were it not, the decision of the court on a motion to continue or postpone is clearly judicial. High on Ex. Legal Rem. sec. 168; *People* v. *Superior Court*, 19 Wend. 701.

This court has repeatedly held that where the exercise of a discretion is involved, a writ of *mandamus* will not be allowed. *People* v. *Williams*, 55 Ill. 178; *Village Council* v. *People*, 78 id. 382; *County of St. Clair* v. *People*, 85 id. 396; *Hildreth* v. *Heath*, 1 Bradw. 82; *People* v. *Pearson*, 2 Scam. 189.

The writ will not be allowed for the purpose of correcting errors of the lower court. It has been refused where it was sought to compel the inferior court to admit certain evidence. It will not be allowed to correct or revise questions of pleading, nor where the court below has acted in a judicial capacity. High on Ex. Legal Rem. secs. 192, 257.

The writ of *mandamus* is never issued in doubtful cases of any kind. *People* v. *Village of Crotty*, 93 Ill. 180; *Railroad Co.* v. *County Clerk*, 74 id. 27; *People* v. *Klokke*, 92 id. 130; *People* v. *Davis*, 93 id. 133.

The probate court properly declined to receive proof as to the writing dated August 16, 1879, until the question as to the proof of the writing dated February 1, 1881, should be decided. The prior contest is a good reason for postponing action. High on Ex. Legal Rem. sec. 260; *Steward* v. *Eddy*, 7 Mod. 143; *Raine's case*, 5 id. 374; *Lovegrove* v. *Bethel*, 1 Black. 668; *State* v. *Mitchell*, 6 S. C. 703.

Mr. JOHN P. ALTGELD, for Mary E. Farrand:

A *mandamus* will not lie against a judge of an inferior court to control his judgment, or to direct a decision either way. It will not be issued where the question decided is one within the discretion of the court.

The probate court has not refused to act in the matter, but, on the contrary, has acted by determining to grant a motion for a postponement of the hearing until further ordered. The application for the postponement was a matter addressed to the sound discretion of the court.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

Stress is laid upon the language of the act in regard to wills, in section 2, chapter 148, of the Revised Statutes of 1874, that when any will shall be exhibited for probate, it shall be the duty of the court to receive probate of the same *without delay*, as being peremptory on the court to proceed at once in receiving probate of a will which is offered for that purpose. No doubt it is the policy of the act that there should be made settlement of the estates of deceased persons at as early a day as practicable. But the language referred to is not to be taken in the sense so literal that the court, on presentation of a will for probate, must *immediately* proceed in the probate thereof. The meaning is no more than that the court shall proceed without unreasonable delay. The courts are vested with more or less discretion as to the order of business before them, and as to advancing or postponing causes. This is recognized in the provision of our Practice act for the keeping of a docket of all the causes pending, and that the causes shall be tried or otherwise disposed in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct. And it must be the rule that ordinarily there will not be interference by *mandamus* to direct when another court shall proceed with the hearing of any particular cause.

In the present case there were two writings, of different dates, before the probate court at the same time, each purporting to be the last will and testament of Wilbur F. Storey, the one last in date revoking all former wills. Which one should the court proceed to receive probate of first? Suppose

the relatrix had insisted that the one first in date,—that of August 16, 1879,—should be first acted upon. There would be a case for the exercise of discretion. And in proceeding first to receive probate of the last writing, and postponing until afterward the probating of the first writing, must be admitted would be a most fit exercise of discretion. Had the refusal of probate of the last will remained the final order of the probate court, then the probating of the first would have been proceeded with without hindrance. But such refusal of probate did not remain a final order, but it was appealed from, and the matter of probating the last will was still pending and undetermined. But, notwithstanding that, the probate court might have the power to go on now and receive probate of the first will. Yet is there not a fair question as to the propriety of so doing? It may be thought that the same reason of fitness which dictated the course of first receiving probate of the last will and postponing thereto the probate of the first will, still operates to continue such postponement until there be had a determination of the controversy pending whether the paper last in date be a will or not. If that shall be found to be the will of the decedent, then the first will is annulled, and the probating thereof would be nugatory. The motion to postpone the hearing as to the first will, under the circumstances, called for the exercise of the court's discretion. It was exercised in making a postponement until the further order of the court, for the reason of the pending appeal from the order refusing probate of the last will. This is such an exercise of a court's discretion as we do not feel called upon to interfere with. There does not appear to have been any abuse of discretion. This court has repeatedly held, that where the exercise of a discretion is involved, a writ of *mandamus* will not be allowed. (*The People* v. *Pearson*, 2 Seam. 204; *Village of Glencoe* v. *The People*, 78 Ill. 383; *County of St. Clair* v. *The People*, 85 id. 396; *The People* v. *Williams*, 55 id. 178.) In High on Ex. Leg. Rem.

sec. 260, it is laid down: "The existence of other litigation in another forum, affecting the matter which is the foundation of the proceedings in *mandamus*, may sometimes operate as a bar to relief by this extraordinary writ. And it has been refused where it was sought to compel the granting of administration, it being shown that a contest was already pending as to a pretended will of the deceased." And see *The People* v. *Superior Court, etc.* 19 Wend. 701; *Stewart* v. *Eddy*, 7 Mod. 143; *Sir Richard Raines' case*, 5 id. 374; *Lovegrove* v. *Bethell*, 1 Blackstone, 668; *Rex* v. *Hay*, 4 Burr. 2295; *Rex* v. *Bettesworth*, 2 Strange, 1111.

On the part of the relatrix, reference is made to the statement of the law as made in 3 Redfield on Wills, 54: "Where the probate court declines to proceed in the probate of a will, or to give the executor letters testamentary, having no justifiable excuse therefor, the Superior Court, by *mandamus*, will compel the probate court to proceed in the matter." There is here no declining absolutely to proceed, but only at the present time, for what the court deems the justifiable reason, —that there is a proceeding pending for the establishment of a later will,—amounting but to a continuance on motion made therefor. The authority cited should not control in such a case.

A point is made by the relatrix that the probate of a will is a ministerial act, and reference is made to *Ferguson* v. *Hunter*, 2 Gilm. 657, and *Ayers* v. *Clinefelter*, 20 Ill. 473, as so holding. These decisions were under former statutes, and previous to 1849. The statute of 1819 authorized probate of a will to be made before the county commissioners. In 1837 a probate court was created, presided over by a justice of the peace, and the statute declared the probating of a will to be a ministerial act. The present statute has no such provision. A change was made in 1849, establishing the county court a court of record to be held by one judge, the court being vested with all the powers and jurisdiction of the probate court as

then established,—the act declaring that granting letters testamentary or of administration, determining who are entitled to said letters, should be considered as general judicial powers under the act. The constitution of 1870 provided for a county court to be a court of record to be held by one judge, and conferred upon it original jurisdiction in all matters of probate. The constitution also provided for the establishment of a probate court in certain counties, and under this section the probate court of Cook county has been created with an original jurisdiction of all probate matters. In *Duncan* v. *Duncan*, 23 Ill. 364, it was held that parties in interest might contest the validity of a will before the probate court as well as by bill in chancery, and should be allowed to examine the attesting witnesses as well as others. We have no doubt that the court, here, in acting upon the motion for postponement, should be regarded as in the exercise of judicial functions, and that the same doctrine is to be applied as in a case of such kind.

The similarity of the provisions of the two wills, and the fact that the same person is appointed executrix in each, is remarked upon as removing the objection to the immediate probate of the earlier will. This would diminish the inconveniences which would result from the probating of two wills of different dates, but would not entirely obviate the same.

It is insisted that there is a want of good faith on the part of Mrs. Farrand in the prosecution of her appeal from the order refusing probate of the later will,—that it is for her interest that the order should stand and the will not be established, as in the case of intestacy she would come into immediate possession of one-third of the estate. On the hearing before the probate court, on the motion for postponement, such want of good faith was averred on the one side and denied on the other, and in view thereof the court made its decision. The motive for taking the appeal hardly seems to be a proper subject of inquiry. There was the right to

take the appeal, and it was taken, which left the question of the validity of the later will undisposed of and still pending for decision. That there was ground for the taking of an appeal, there is the evidence furnished by the relatrix's action in herself taking an appeal. We can see that it appears to be for the interest of Mrs. Farrand that there should be a case of intestacy,—that there should be no will whatever established; yet, as between the two wills, it is for her interest that the one later in date should be established, rather than the earlier one. She has, at any rate, exercised her right to take an appeal, and her motive in so doing seems hardly inquirable into to do away with the effect of the appeal in its bearing upon the decision of the probate court.

Upon consideration of the whole matter, there is not made to appear, here, the clear right to the writ of *mandamus* which must be shown in order to its allowance, and we are of opinion the demurrer to the answer should be overruled, and that there should be judgment in favor of the defendant, denying the writ.

Mandamus denied.

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JOHN SPRINGER

v.

JOSEPH E. SPRINGER.

Filed at Springfield September 23, 1885.

1. RESULTING TRUST—*when it arises—and in what proportion.* Where a party receives money of another, to be invested in the purchase of land, and pays out the same, with other money of his own, in a purchase, taking a deed in his own name, he will hold the land so acquired in trust for the person whose money he has so used, in the proportion it bears to the entire consideration paid.

2. LACHES—*from what time to be computed—as against the establishment of a resulting trust.* A party who takes a conveyance of land in his

own name, partly paid for with the money of another placed in his hands, can not set up as a defence to a bill to enforce a resulting trust, the *laches* or delay of the complainant for the time he has admitted and recognized his equitable rights. Such defence will avail him only from the time he sets up an adverse claim, and denies the complainant's rights.

APPEAL from the Circuit Court of McLean county; the Hon. O. T. REEVES, Judge, presiding.

Messrs. BLADES & NEVILLE, for the appellant:

A complainant must recover according to the case made by his bill. *Swift* v. *Castle*, 28 Ill. 209; *Randolph* v. *Oustall*, 58 id. 53; *Hertle* v. *Hall*, 60 id. 344; *Herne* v. *Cantrell*, 59 id. 329.

The *laches* of complainant is a bar to the relief sought. *Cox* v. *Montgomery*, 36 Ill. 398; *Carpenter* v. *Carpenter*, 70 id. 457; *Hall* v. *Fullerton*, 69 id. 448; *Mahoney* v. *Mahoney*, 65 id. 406.

Messrs. STEVENSON & EWING, and Messrs. FIFER & PHILLIPS, for the appellee:

Laches not being set up in the answer, can not be availed of as a defence. *Harris* v. *Cornell*, 80 Ill. 54; *O'Halloran* v. *Fitzgerald*, 71 id. 53.

Being a case of trust, limitation does not apply. *Russell* v. *Peyton*, 4 Bradw. 473.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Joseph E. Springer, in the circuit court of McLean county, against John Springer and Nicholas Risser, to enforce the conveyance of an undivided interest in certain lands in McLean county, which the complainant in the bill claimed to own, and where the legal title vested in defendant Nicholas Risser. The defendants put in an answer to the bill, to which replication was filed, and the cause proceeded to a hearing on the pleadings and

the evidence, and the court rendered a decree requiring defendants to convey to complainant an undivided one-fourth of the premises described in the bill, within a short day named in the decree; and defendant Springer was also required to pay the complainant the sum of $1334.60, as a reasonable rent for the premises while the lands were occupied by the defendants. To reverse this decree, John Springer, one of the defendants, appealed.

There is a decided conflict between the evidence of the complainant in the bill, and the defendant John Springer, in regard to the principal matters involved in the controversy. It is alleged in the bill that the complainant sent from Hamilton, in the State of Ohio, to John Springer, in Bloomington, Illinois, in the years 1868 and 1869, large sums of money, to be invested in lands; and it is also claimed that a portion of this money was invested in the "Otto farm,"—the land in dispute. The court, in the decree rendered in the cause, found that complainant had sent $2000 to the defendant, which was invested in the land in dispute. We have examined the evidence in the record carefully, and we are of opinion that this finding is fully sustained. The complainant proved by the secretary and treasurer of a mining company, that he obtained the money for his services while in the employ of the company, and this was followed by the evidence of the cashier of a national bank in Bloomington, who testified that the drafts sent by complainant to John Springer were cashed by the latter at the bank. In connection with this evidence the letters of the defendant were read in evidence, which seem to establish the fact that the money was used in the purchase of the land for complainant and defendant, but the title was taken in the name of the latter. In his letter of October 28, 1868, he says: "As I said before, D. J. Otto's farm is for sale, and I think of buying him out. * * * I will buy the land for us." On March 4, 1869, he wrote as follows: "Yours of February 26 came to hand to-night, with draft for

$550.50. I settled with D. J. Otto. Got $1600 in the bank of Bloomington, for ninety days. We must make it so the bank can be paid when due." There were other letters of a similar character, but it will not be necessary to set them out here. It seems clear from the letters, in connection with the other evidence, that the undivided half of the Otto farm was purchased by John Springer for the complainant and himself, and that complainant's money paid at least one-half of the purchase price of the land.

The appellant has interposed the defence of *laches* as a bar to the relief claimed in the bill. The land was purchased in February, 1869, and this bill was filed in August, 1876. If appellant, from the time of the purchase, had denied that the complainant had any rights in the land, and all the time claimed it as his own property, there might be some ground for relying on this defence. But such was not the case. Complainant testified that in November, 1870, the defendant promised to make him a deed. He also testified that he had many conversations trying to get a settlement of the matter, "from spring to fall, and from fall to spring." One witness testified that as late as 1875 John Springer told him that he and complainant owned eighty acres of the Otto farm together. This was only a short time before the bill was filed. If the defendant held the land in trust for complainant, admitting complainant's rights to the property, while this state of things continued he could not set up as a defence that complainant was guilty of *laches* in asserting his rights to the property.

The complainant has assigned a cross-error, claiming that the court erred in not giving him more land than an undivided one-fourth. There is some evidence that more than $2000 of complainant's money was invested in the purchase of the land; but after due consideration of all the evidence, we are inclined to think the decree is right, and that it ought not to be disturbed.

Decree affirmed.

WILLIAM HENEKE *et al.*

v.

JOHN FLORING.

114 554
146 641
114 554
148 20
148 494

Filed at Springfield September 23, 1885.

1. RESULTING TRUST—*evidence after great lapse of time.* The evidence to establish a resulting trust after the lapse of fifteen or sixteen years, and especially after many of the principal witnesses having knowledge of the facts are dead, should be of the most satisfactory kind. If the evidence fails to satisfy the court that the money paid for the land was that of the party seeking to establish the trust, no resulting trust can be declared.

2. Where a resulting trust is sought to be established after the lapse of many years, on the ground that complainant's money was used in paying for the same, and that complainant's wife, by conspiracy and fraud, had the conveyance made to her imbecile son by a former marriage, it is incumbent on the plaintiff to establish these facts by very clear and satisfactory evidence, and failing to do so, he can have no relief.

APPEAL from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. E. B. ESHER, Mr. WILLIAM RITCHIE, and Mr. S. CORNING JUDD, for the appellants:

The party alleging fraud must clearly and distinctly prove it. The burden of proof lies on him. The law in no case presumes fraud, but in favor of innocence. In no doubtful matter does the court lean to a conclusion of fraud. Kerr on Fraud, 382, 384, 494.

A resulting trust in lands may be proved by parol, or by the admissions or declarations of the purchaser. But the evidence should be clear and unequivocal, and not merely preponderating. There should be no room for reasonable doubt as to the facts. Where there has been a long lapse of time, and the parties have died since the transaction, the case should be looked upon with suspicion, and the trust allowed only upon the most satisfactory evidence. Bigelow on Fraud, 489; *Enos* v. *Hunter*, 4 Gilm. 211.

By whom could the circumstances here be better proved than by Mrs. Floring, who is dead, and by Heneke himself, who is a lunatic? The facts in all cases of resulting trusts must be proved with great clearness and certainty. Perry on Trusts, sec. 137.

The relations between Floring and the half-witted son of his wife, are such as to suggest the probability that the deed to Heneke was meant as a provision in his favor. Perry on Trusts, secs. 143, 144.

Mr. L. V. FERRIS, and Mr. SIMEON STRAUS, for the appellee:

Where there is evidence to support a decree it will not be disturbed, although the evidence might, in the opinion of this court, justify a different result. *Railway Co.* v. *Moore*, 77 Ill. 217; *Coari* v. *Olsen*, 91 id. 273; *Wiggins Ferry Co.* v. *Higgins*, 72 id. 517; *Wiegleb* v. *Thomsen*, 102 id. 156; *Long* v. *Fox*, 100 id. 43.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The title to the tract of land in controversy is, or was, in William Heneke, an insane person. His conservator, Caroline Merwitz, had brought an action in ejectment against John Floring, to recover possession of the land for her ward. That suit it was expected would be called for trial at the June term, 1884, of the Superior Court of Cook county, and thereupon the defendant in that suit filed this bill, alleging the land, although conveyed to William Heneke, was, in fact, bought by him, and with his own money, but by the fraud practiced by his wife, Dorothea, since deceased, and the former owner, Caroline Merwitz, the deed was made to William Heneke, without the knowledge or consent of complainant, when it should have been made to him. To this bill the insane owner and his conservator were made defendants. An answer was filed by the conservator, for herself and on behalf of her ward, in which most of the principal allega-

tions of the bill are denied, and in which the conservator claimed the land for her insane or lunatic ward as his rightful property, free from any claim of complainant. A replication to the answer was filed, and the cause was submitted for hearing on the pleadings and the evidence, and the court rendered a decree finding the complainant, on or about the 4th day of March, 1878, bought the land in controversy; that the whole of the purchase money was paid by him, and that the deed to William Heneke was made without his knowledge or consent, and was made with intent to defraud him. It was thereupon decreed that by the conveyance from Caroline Merwitz to William Heneke, of the land, a resulting trust in such land was created in complainant, and it was ordered that the conservator should, within a certain period, convey the land to complainant, and in default thereof it was further ordered the master in chancery should make such conveyance, and the injunction that had previously been awarded restraining the conservator from the further prosecution of the ejectment suit, was made perpetual. An appeal was allowed defendants, and by an agreement of parties, made in open court, the appeal was taken to the Supreme Court in the Central Grand Division.

It appears that on the 4th day of March, 1878, the tract of land in controversy, and another ten acres adjoining it, were both bought of Caroline Merwitz and her husband, since deceased. The deed for the ten acres which are the subject of this litigation, was made to William Heneke, and the deed to the other ten acres was made to the complainant. Both deeds were made on the same day, as a part of the same transaction, and both were recorded at the same time.

Two questions are made on the record: First, whether the land was bought and paid for with the money of complainant; and second, whether the deed was fraudulently made to William Heneke, without the knowledge or consent of complainant. The evidence bearing on the questions stated

is very conflicting, and in some respects is unsatisfactory. Complainant claims he paid the entire purchase money of both tracts of land with his own money,—a part of the purchase price consisting of $1200, money previously loaned to the grantors, and the balance having been paid in money,—$500 at the time of making the deed, and the balance at another subsequent time. On the other hand, it is claimed that Dorothea, then the wife of complainant, paid a large portion of the purchase money from her separate means, and had the deed made to her invalid son, William Heneke, to make suitable provision for his maintenance in case of her death. Some explanation of the conduct of the parties may be found in the fact that William Heneke is the son of the deceased wife of complainant by a former marriage. He was always rather feeble in health, and by some of the witnesses termed a cripple, and years before these events transpired he became a confirmed idiot, or harmless insane person. From the time of his mother's marriage with complainant the boy resided with them, up to the time of his mother's death, which occurred July 25, 1883. It will be remembered both tracts of land were bought March 4, 1878, and soon after the making of the deed complainant erected a small house on the ten acres deeded to the invalid boy, in which the parties afterwards resided. Shortly after the death of the boy's mother he was sent away to the home of his aunt, who is now his conservator. It does not appear that during all the time complainant resided on this tract of land he ever made any complaint, to his wife or to any one else, that the title to this particular ten acres was in William Heneke, until a day or two before the death of his wife, and not until after he had become satisfied her death would soon take place. The evidence bearing on this branch of the case will be referred to again, further on in this opinion.

Concerning the first question made, the difficulty lies in ascertaining whose money was, in fact, used to buy the land.

Unless complainant's money was used in making the payment for the land, of course no resulting trust could arise in his favor. The law applicable in such cases is well understood, and needs no discussion. The evidence to establish a resulting trust after the lapse of so many years should be of the most satisfactory character, and especially since so many of the parties who had most knowledge of the actual facts are now dead. It is obvious the evidence in this record is not of that character. That which tends to support complainant's theory of the case comes mostly from himself. Without conceding he is a competent witness, under the statute, as against the conservator of the insane defendant, still, if his testimony shall be considered with the other testimony in the case, it fails to make any satisfactory case in his favor. As to the payment of the money by himself, his testimony has but little, if any, corroboration from any other source. There is some evidence that his wife paid some, if not all, of the purchase money for the tract of land conveyed to her son. In the conflict that exists it can not be insisted, with any show of reason, that it is so clearly proven that complainant paid his own money for this particular tract of land, that a resulting trust should be declared in his favor,—at least it is not so in the opinion of this court.

As respects the other question raised, it may be said no such conspiracy as is alleged in the bill, to practice a fraud on complainant as to the making of the deed to Heneke, is proved. It is alleged that Caroline Merwitz, one of the grantors, and Dorothea, his wife, combined to defraud complainant, and procured the scrivener, one Senf, to prepare two separate deeds,—one for each ten acres,—and exacted a promise from him that he should not inform complainant of the fact. So far as the wife of complainant is concerned, there is not a scintilla of evidence to connect her with any wrongful conduct in regard to the making of the deed to her son, either by herself or in connection with any other person. It is doubtful,

even, whether she was in Chicago the day on which the deeds were executed. How that may be, however, matters little, for there is no proof from any source that she did anything to practice a fraud on her husband. Nor is there any satisfactory evidence that Caroline Merwitz did anything to deceive or defraud complainant in the making of the deed to the boy, as was done. It is certain she had no personal acquaintance with the scrivener prior to the time she went there, as all parties agree, to procure him to make the deed. She had heard of him before, but had no personal acquaintance. The scrivener resided in Oak Park, and Mrs. Merwitz in Chicago, and complainant resided in the town of Proviso, not far from Oak Park. Complainant was personally well acquainted with the scrivener selected, and had been for many years. It is singular, indeed, if Mrs. Merwitz intended to perpetrate a fraud on complainant, she would go out of the city to a personal friend of complainant, and to one who was almost a total stranger to herself, to procure his assistance to consummate the fraud. She says she was directed by complainant himself to go to Senf to have the deeds prepared, and that does not seem to be denied by him. The whole accusation against her has the air of the utmost improbability. The scrivener says that she asked him not to tell complainant two deeds were prepared,—one for each ten acres,—and he says he promised her he would not. If he made any such promise he did not observe it, for at the time the deeds were made he swears he read both deeds to him, and undertook to explain them to him in German. It is said complainant is an ignorant man; but he was present when the deeds were executed, and no one would claim he was so ignorant he did not know there were two papers or deeds executed at the time. He admits in his testimony he knew two deeds were executed. It is also fully proved he went with the scrivener to the recorder's office, at least a part of the way, alone, when no one of the alleged conspirators was present, and if he wished any

explanation why two deeds were executed, there was ample opportunity to obtain it. The witness Senf says that when he undertook to explain the deeds to complainant, at the house where they were executed, the parties talked so much to complainant, and drew his attention to such an extent, that he could not make him understand the explanation; but they left the house soon after, alone, to go to the recorder's office, carrying with them both deeds, and there was certainly nothing to prevent him from explaining the contents to the complainant, had he wished to do so. It is all a sham and pretence the scrivener was prevented from explaining the contents of the deeds to complainant. Abundant opportunity was afforded him to do so, if he had been prevented, as he says he was, from making any explanation at the house by the parties interested, and especially would he have done so after he had been made aware there was a design to conceal from complainant the making of the deed to the boy. The testimony of this witness adds nothing whatever in support of complainant's theory of the case that he was overreached by these two women in the making of the deed. It rather shows, if it proves anything, the deeds were made precisely as the parties all agreed they should be made. The subsequent conduct of complainant strengthens this hypothesis. It is in proof he had both deeds in his possession a long time before the death of his wife, and during all that time he made no complaint, to her or to any one else, the deed to the boy had been wrongfully procured, or that it had been made in fraud of his rights. The scrivener who prepared them, as he well knew, was his friend and acquaintance, and lived only a few miles from him. He could have taken the deeds to him any day and had them explained to him, but this he did not do.

Assuming, then, as it is thought the evidence warrants the court in doing, the deed to Heneke was made as it was intended it should be, with the knowledge and consent of complainant, his subsequent conduct is consistent with this theory

of the case. It will be remembered the boy was always in delicate health, and constantly grew more infirm, until he became a hopeless idiot. No doubt it was believed by complainant that he and his wife Dorothea would both survive him, and that they would still have the land. This is evident from his interview with the minister, the Rev. Mr. Alberding. He had then become satisfied the death of his wife would soon occur, and his solicitude was how he might still retain the land. The advice he wanted of the minister was, how to get the land. No complaint was made the land had been wrongfully deeded to Heneke. He brought both deeds to the minister from his own custody, and after he had read them he told complainant he could do nothing for him, as the land belonged to the boy. Complainant then told the minister he should do the best for him. The witness then took complainant to the room of his sick wife, and he asked her if complainant should have the land if Wilhelm died, and she said yes, if he would care well for the boy. Prior to the time of the interview with the minister, complainant had both deeds in his possession perhaps for a period of well nigh, if not quite, five years, and when he brought them out for examination there was no pretence he did not know the land had been conveyed to Heneke, or that it was wrongful, but his whole solicitude was to secure the land in some way, now that his wife was about to die and the boy would survive. Another fact not of much consequence, but it tends in some degree to support this view of the case, is, that after the death of his wife he sued Heneke for his board while he resided in his family, and for the taxes he had paid on the land. That suit was, however, abandoned when this suit was commenced. On the whole record considered, no case is made, by any such clear and satisfactory testimony as the law requires, that would warrant the relief decreed to complainant.

The decree will be reversed, and the cause remanded, with directions to the court to dismiss the bill.

Decree reversed.

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124 92
114 562
130 581
114 562
140 515
143 104
143 169
114 562
152 545
153 652
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165 615
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168 157
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193 *326
114 562
207 510

THE JACKSONVILLE RAILWAY COMPANY

v.

THE CITY OF JACKSONVILLE.

Filed at Springfield September 23, 1885.

1. SPECIAL ASSESSMENTS *for improvement of street—necessity for an ordinance—and requisites thereof.* A valid ordinance is essential to proceedings by special assessment for the improvement of a street by a city. If the ordinance is invalid, a judgment confirming an assessment on property is not authorized.

2. An ordinance for the improvement of a public street, the cost of which is to be assessed, in whole or in part, upon abutting property, must specify the nature, character, locality and description of the proposed improvement.

3. An ordinance for paving a street partly by special assessment and the residue by general taxation, required the pavement to be what is known as the "Bloomington brick pavement," and the foundation thereof to be laid of cinders, sand, gravel, or other materials equally suitable, at least six inches deep, etc. The estimate of its cost, approved by the city council, showed that cinders were to be used. It was *held*, the ordinance was not obnoxious to the objection of uncertainty as to the materials to be used for the brick to rest upon. In such case the words, "or other materials," etc., may be treated as surplusage.

4. An ordinance for the paving of a street is not void for uncertainty, because it requires the brick pavement to be laid upon a foundation of sand, gravel or cinders.

5. Nor is such an ordinance rendered invalid by a provision requiring all the work done and materials used to be subject to the approval of the city engineer, and in accordance with the plans and specifications to be furnished by the city council. Such provision does not give him the power to determine the kind of materials to be used, but only the right to see that the materials required are used, and the work done as directed by the ordinance.

6. MUNICIPAL INDEBTEDNESS—*constitutional limitation—as affecting power to improve streets, etc.* The fact that a city has already exhausted its constitutional power to incur a debt, can not be shown to defeat a proceeding by it to improve a street by special assessment in part, and partly by general taxation. That question can not arise until the city seeks to borrow money or incur an indebtedness in that regard.

APPEAL from the County Court of Morgan county; the Hon. MONTREVILLE T. LAYMAN, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for the appellant.

Mr. RICHARD YATES, and Messrs. SPRINGER & DUMMER, for the appellees.

Mr. CHIEF JUSTICE MULKEY delivered the opinion of the Court:

This appeal brings before us for review a judgment of the county court of Morgan county, confirming an assessment by the corporate authorities of the city of Jacksonville, against the road-bed and franchise of the Jacksonville Railway Company, for its ratable portion of the costs and expenses of constructing a brick pavement on that part of East State street which lies between the east line of East street and the east line of Illinois avenue, in said city of Jacksonville, to be known as the "Bloomington brick pavement." The commissioners estimated the cost of the entire improvement at $17,569.31. Of this amount $915.43 was charged to the city, to be raised by general taxation, and the balance was assessed upon the abutting property, the appellant's portion being fixed at $1920. On appeal by the company from this assessment, it was reduced by the jury to $1062. Pending a motion for a new trial, the city entered a *remittitur* of two per cent on the amount found by the jury, which reduced it to $1040.76, for which sum the court entered final judgment, and the company appealed.

A reversal is urged, mainly on the alleged ground that the ordinance under which the assessment was made, as passed by the city council, is invalid. The objection, of course, goes to the foundation of the whole proceeding, and if well taken the judgment can not stand. The other points made in the brief go to the form rather than the substance of the proceeding.

It is claimed the ordinance is fatally defective in this, that it does not specifically determine the material of which the foundation of the pavement is to consist; that the power to

determine whether it shall be of sand, gravel, cinders, or other like material, is, by the ordinance, given to the city engineer, and if not given to him, then no means are provided for determining the question at all, and that in either case the ordinance would be void. In support of this view of the subject the cases of *Foss* v. *Chicago*, 56 Ill. 354, *Andrews* v. *Chicago*, 57 id. 239, *Lake Shore and Michigan Southern Railroad Co.* v. *Chicago*, 56 id. 454, and *Lake* v. *City of Decatur*, 91 id. 600, are cited. We fully concede the general principle recognized by these cases, viz: that an ordinance providing for the improvement of a public street, the cost of which is to be assessed, in whole or in part, upon the abutting property, must specify "the nature, character, locality and description of such improvement." This is nothing more than an express requirement of the statute authorizing municipal authorities to make assessments for such purpose. It is clear, therefore, that an ordinance which does not substantially conform to the requirements of the statute in this respect will confer no power on the corporate authorities to make the assessment. The question then resolves itself into this: Is the ordinance under which the present assessment was made, obnoxious to the objection urged against it?

The first section of the ordinance, after specifying the location of the improvement, and providing that it shall be paved with brick, proceeds as follows: "The pavement shall be what is known as the 'Bloomington brick pavement.' The foundation thereof shall be laid of cinders, sand, gravel, or other materials equally suitable, at least six inches deep, conforming to the grade to be established by the city, through the city engineer, surfaced by at least one inch of sand. The first course of brick shall be hard paving-brick, laid flat, all joints to be thoroughly filled in with sand,—this course of brick to be covered by at least one inch of sand. The upper course of brick shall be extra hard-burnt paving brick, laid on edge, all joints to be thoroughly filled with sand, leaving

one inch of sand on top,—all of the work done and material used to be subject to the approval of the city engineer, and to be done in accordance with the plans and specifications to be furnished by the city council of said city."

In pursuance of the ordinance, the city council appointed three commissioners to make estimates of the cost of the improvement, including labor and materials, and all other expenses attending the same, who, on the 5th day of September, 1884, submitted to the city council a written report of their action in the premises, wherein all the labor and materials required for the improvement, together with the cost thereof, are specifically enumerated, the items being as follows:

8832 square yards of labor, at 28 cents, - - -	$2472.96
706,000 top brick, at $11.65, - - - - - - - -	8224.90
353,280 bottom brick, at $9.65, - - - - - -	3406.45
92 cars cinders, at $7.50, - - - - - - - - -	690.00
98 cars sand, at $9, - - - - - - - - - - -	882.00
Bring car track to grade, etc., - - - - - - -	985.00
Engineering, - - - - - - - - - - - - -	200.00
Commissioners' fees and court costs, - - - -	60.00
Collector's fees, - - - - - - - - - - - -	344.00
Total, - - - - - - - - - - - - -	$17,569.31

This report, which was accepted and approved by the city council at the time of its presentation, shows conclusively that sand and cinders alone were estimated for the foundation of the proposed pavement. That the ordinance expressly provides for the use of just such material is conceded. Wherein, then, is the uncertainty in the ordinance complained of? Do counsel wish to be understood as holding that an ordinance is necessarily void because it gives a municipality or contractor the right to choose between two or more kinds of material equally suitable for a proposed improvement? Or do counsel maintain that the present ordinance, in order to be good, should have taken away absolutely all option in

respect to the use of the sand, gravel or cinders, by declaring specifically which should be used? We have no hesitancy in holding that such a construction of the statute would be exceedingly narrow, and wholly unwarranted by the words of the act. In many cases, we have no doubt, it would materially embarrass municipal authorities in making local improvements, by confining them to a particular kind of material, when other equally good material of the same general class might be had on as favorable or better terms, if an election were given.

The objection, however, is probably based mainly on the expression, "*or other materials equally suitable,*" etc., which immediately follows the words, "cinders, sand, gravel," the position being, that inasmuch as the ordinance is confessedly uncertain as to the materials intended to be comprehended in the expression in question, it is sufficient to bring it within the principle of the cases above cited. If the phrase in question was used with any specific purpose or object, it was doubtless intended to include all material of the same kind or class as that mentioned, if any such existed. Inasmuch as the articles proposed to be used, and upon which the estimates were made, are specifically named in the ordinance in question, whether the assessment would be good if the estimates were made upon other material not so specified, does not arise, and need not therefore be discussed. In the view we take of the matter, it may be admitted the expression, "or other materials equally suitable," is inoperative and void, on the ground suggested. But it does not at all follow that the ordinance is therefore invalid as to the kinds of material it specifically mentions. The objectionable part of the ordinance may be rejected as mere surplusage, and the ordinance still be good as to the residue.

In respect to the claim that the ordinance is an attempted delegation of power to the city engineer to determine what kind of materials is to be used, we regard it as clearly un-

founded. The ordinance attempts to do nothing of the kind. By a provision in it the engineer is simply given a supervisory power over the work,—not for the purpose of determining what kind of materials is to be used, but rather for the purpose of seeing that the materials used are of the kind and quality specified in the ordinance, and that the work is done as therein directed.

Appellant offered to show, on the trial, that the city of Jacksonville had no power to incur further indebtedness,—that its existing indebtedness already largely exceeded the constitutional limitation which forbids any county, city, etc., from becoming "indebted * * * to an amount, including existing indebtedness, in the aggregate exceeding five *per centum* on the value of taxable property therein," etc. (Const. art. 9, sec. 12.) The court declined to admit the evidence, and this is assigned for error. The position of appellant, as we understand it, is, that a town or city which has exhausted its constitutional power to incur a debt, has no power to pass an ordinance providing for local improvements which contains a provision, as was the case here, that a part of the cost of the improvement shall be raised by general taxation. We fail to perceive any force in the point made, and the authorities cited by appellant clearly do not sustain that view of the law. No question as to the power of the city of Jacksonville to incur a debt is presented by this record. It does not appear from anything before us that the city has ever asked any one to credit it on account of the proposed improvement. It has not incurred a debt in respect to it, nor is it threatening to do so. The city simply proposes to raise its share of the expenses by general taxation. It is not even attempting to anticipate a tax levy. Should it fail to raise the money in the manner proposed, and it should then attempt to borrow it, or to hire some one to do the work on the city's credit, then, upon the complaint of a tax-payer, the constitutional provision referred to might be invoked, but

until then no question of that kind can arise. It may be assumed that if the city finds it can not raise its share of the necessary funds by taxation, as contemplated in the ordinance, it will abandon the enterprise altogether, rather than attempt to raise it in violation of the constitution.

The claim is also made that the assessment was too high, that the verdict of the jury is not supported by the evidence, and that the judgment should be reversed for this reason. It was the peculiar province of the jury to settle this question, and they have done it. As we see nothing to the contrary, we must assume they faithfully and conscientiously discharged this duty to the best of their ability. Opinions of witnesses in respect to the value of property of this kind most always take a very wide range, and can seldom be harmonized. The present case is no exception to the rule.

Upon a careful review of the evidence we are unable to say the verdict is clearly contrary to the weight of the evidence, and unless we could do this we would not be warranted in reversing the judgment on the ground the evidence does not sustain the verdict.

The judgment will be affirmed.

Judgment affirmed.

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114 568.
50a 370.

HERALD CATLETT *et al.*

v.

JOHN H. DOUGHERTY *et al.*

Filed at Springfield September 23, 1885.

1. ARBITRATION AND AWARD—*attempt by one of the parties to improperly influence an arbitrator—ground for setting aside the award.* It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside the award, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, designed and having a tendency to improperly affect his decision as an arbitrator, without

showing that such statement, in fact, produced any harmful result to such other party.

2. A party to an arbitration who by overt acts attempts to corrupt or improperly influence the arbitrators, or any one of them, to make an award in his favor, will not be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon.

3. SWORN ANSWER IN CHANCERY—*effect of testimony of the defendants in its support, as to the weight of evidence to overcome the answer.* Where a defendant in a suit in equity answers under oath, as required, denying the allegations of the bill, his testimony as a witness in his own behalf can not add any weight to his sworn answer, as evidence, and it may be overcome by the testimony of two witnesses, or what is equivalent thereto.

4. Where two defendants to a bill in chancery requiring sworn answers, each answers, and also testifies as to his own conduct and declarations, alone, and the proof shows that only one is a party in interest, neither the answer nor the testimony of the one will strengthen or aid the answer or evidence of the other, and the testimony of two witnesses, or what is equivalent thereto, will overcome the answer.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. J. W. WILKIN, Judge, presiding.

Mr. W. R. LAWRENCE, and Mr. J. L. RAY, for the appellants:

In a suit to set aside an award, the arbitrators may testify that a mistake was made by them, or that certain matters were not acted upon. *Spruck* v. *Crook*, 19 Ill. 425; *Knox* v. *Symonds*, 1 Ves. Jr. 369; *Burchell* v. *Marsh*, 17 How. 349; 2 Greenleaf on Evidence, sec. 78.

A court of equity will set aside an award when it is clearly shown by evidence that the same, or any part, was the result of mistake upon the part of the arbitrators. *Pulliam* v. *Pensoneau*, 33 Ill. 374; *Bouck* v. *Wilber*, 4 Johns. Ch. 406; *Williams* v. *Warren*, 21 Ill. 541; *Stone* v. *Atwood*, 28 id. 41.

If one of the parties converses with an arbitrator, or in any way attempts to influence him, and the award shall be in favor of such party, it will be set aside, as it will be conclusively presumed that such conduct had an improper effect,

and the arbitrator is a competent witness to prove this fact. *Spruck* v. *Crook*, 19 Ill. 415; *Moshier* v. *Shear*, 102 id. 169; *Drew* v. *Leburn*, H. L. C. 1; 1 Jacobs' Fisher's Digest, 371.

If the arbitrators do not award of all matters in difference of which they have notice, the award is void *in toto*, and the converse is alike true. *Whetstone* v. *Thomas*, 25 Ill. 326; Watson on Arb. and Award, 121; *Alfred* v. *Railroad Co.* 92 Ill. 610.

Misconduct of arbitrators will avoid the award; and that which would be misconduct on the part of a juror would be the same on the part of an arbitrator in common consultation. *Moshier* v. *Shear*, 102 Ill. 169; *In re Hare*, 6 Bing. (N. C.) 158; Morse on Arb. and Award, 537.

The arbitrators must be present at each and every step of the proceeding. The parties are entitled to the thought and consideration of each arbitrator. *Smith* v. *Smith*, 28 Ill. 56; *Wade* v. *Dowling*, 4 El. & Bl. 44; *Eads* v. *Williams*, 24 L. J. Ch. 531; *Wright* v. *Grahame*, 3 Exch. 131; 13 M. & W. 466; Morse on Arb. and Award, 152.

MESSRS. MANN, CALHOUN & FRAZIER, for the appellees:

There was no error in refusing to allow an amendment to the bill. That was a matter of discretion.

The circuit court could not review the testimony before the arbitrators, it not being a court of appeals to correct errors.

A mistake in making an award must be that of all the arbitrators. *Stone* v. *Atwood*, 28 Ill. 41.

The allegations of gross misconduct on the part of the arbitrators is denied, and not sustained by the evidence. The answer is made under oath, and required two witnesses to overcome the same, and the defendant James M. Dougherty denies making the alleged admissions.

The matter of Lee's affidavit was not material, and if communicated could not have influenced the arbitrators.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill in equity, exhibited by Herald Catlett and Hiram Catlett, against John H. Dougherty and James M. Dougherty, to enjoin the prosecution of a suit upon a bond given to secure the performance of an award, and to set aside the award. The decree of the circuit court denied the relief prayed, and dismissed the bill. That decree was affirmed on appeal to the Appellate Court for the Third District, and the record is brought to this court by appeal from the decision of that court.

Herald Catlett and John H. Dougherty having certain matters of difference between them, submitted the same to the arbitrament of John Sidell, Henry C. Forbes and Daniel Gregg. Herald Catlett entered into bond, with Hiram Catlett as surety, conditioned that he would perform the award. The arbitrators awarded that Catlett should pay Dougherty $1899.98. Catlett not paying the award, suit was brought on the bond in the name of John H. Dougherty, for the use of James M. Dougherty.

An amendment to the bill is as follows: "Complainants show that since the filing of the original bill herein, they have been informed, and believe the fact to be, and charge the same to be true, that after the adjournment of the hearing by the said arbitrators, and before they made their said award, and while they were considering of their said award, the said James M. and John H. Dougherty procured from one Lee an affidavit stating that a certain note constituting one of the claims of the said Herald Catlett before said arbitrators, had been improperly procured of him, the said Lee, by said Catlett, and which affidavit denied and disputed certain statements made by said Catlett in reference thereto, before said arbitrators, and that said Dougherty communicated to said arbitrators, before the finding of said award and after the said hearing, the contents of said affidavit. And these com-

plainants do charge that said arbitrators did receive information concerning the said Lee notes, after said hearing and before the making of the said award." The answer of the defendants is under oath, and denies this allegation. The defendants were examined as witnesses, on the trial, and then again denied the allegation; but, in our opinion, this added nothing to the weight of evidence on their behalf, under this issue. They have the full benefit of their denial in their answer, and it is not possible that the mere repetition of the same thing in a different form, by the same person, can add to its effect. The question is, whether the denial is overcome by the evidence of two witnesses, or what is equivalent thereto.

The arbitrator Sidell testified, that after the evidence was heard in the arbitration, and before the arbitrators had made any award, James M. Dougherty told him, that they (meaning himself and John H. Dougherty,) had procured an affidavit of Lee, in which he swore that Herald Catlett had obtained the note from him (Lee) at a time different from that at which Catlett swore that he obtained it,—in substance, that Lee had, in that affidavit, sworn altogether differently from the testimony of Catlett. Herald Catlett testified, that about ten or fifteen days after the arbitration, James M. Dougherty told him that he (Dougherty) had told the arbitrator Sidell, at the time and place named by Sidell, that Catlett did not have the Lee note as soon as he said he did. DeWitt C. Frazier testified, that he saw James M. Dougherty on the same day during which Sidell testified that Dougherty made the communication to him; that they were then on a train going to Danville; that Sidell was on the same train; that Dougherty then said he had an affidavit of Lee, in which it was set out that the note, about which it was given, was turned over to Catlett at a different time from what Catlett claimed it was. Lee proves the making of the affidavit, and the participation therein of John H. and James M. Dougherty, and the start-

ing of James M. Dougherty to the depot a little while before the train went east to Danville.

It is to be observed that neither the answer nor evidence of James M. or John H. Dougherty strengthens or aids the answer or evidence of the other. Each is independent, and testifies to his own conduct and declarations, alone. We think the evidence on behalf of complainants overcomes the answer, and establishes that James M. Dougherty made the alleged communication to the arbitrator Sidell.

It is important to further observe, that the evidence shows that at the time of the arbitration James M. Dougherty was, in truth, the real party in interest, though the arbitration was carried on in the name of his brother, John H. Dougherty. Lee testified that at the time the affidavit before alluded to was made, John H. Dougherty said: "This matter,"—evidently alluding to the matter of the arbitration,—"was in the hands of his brother, now,—his brother James." And James M. Dougherty testified that in the conversation which he had with Sidell in regard to the arbitration, he used this language in regard to one of the arbitrators: "I said it was very gratifying to me to have the only man I had in the matter, so acceptable,"—thus showing that he regarded the arbitration as his arbitration. Moreover, the award, as has been seen, was assigned to James M. It is unimportant whether Sidell was, in point of fact, improperly influenced by the conduct of Dougherty, or not. It is sufficient to authorize the enjoining of the suit at law and the setting aside of the award, that James M. Dougherty—one of the real parties in interest,—made a statement to him, in the absence of his adverse party to the arbitration, evidently designed and having a tendency to improperly affect his decision as an arbitrator. Courts will not enter upon an inquiry of how far such conduct may, in fact, have produced harmful results, but will, at the instance of the party intended to be thus injured, set aside the award. A party attempting, by overt

acts, to corrupt or improperly influence such a tribunal to make an award in his favor, is not to be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon. *Strong* v. *Strong*, 9 Cush. 574; *Cleland* v. *Hedley*, 9 R. I. 163; *Sisk et al.* v. *Garvey*, 27 Md. 401. See, also, Morse on Arbitration and Award, 534; 2 Story's Equity, sec. 1452a.

The court erred in dismissing the bill.

The decree of the circuit court, and the judgment of the Appellate Court affirming that decree, are reversed, and the cause remanded to the circuit court, for further proceedings in conformity with this opinion.

Decree reversed.

JOHN MEYER *et al.*

v.

MOSES KROHN *et al.*

Filed at Springfield September 23, 1885.

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1. PARTNERSHIP—*interest in profits—whether a partnership.* A person may contract with a particular member of a firm for an interest in his share of the profits, without making himself a member of such firm and liable for its debts.

2. SAME—*dissolution—of the notice required, to protect retiring partner.* As to persons who have never had any business transactions with a partnership firm, notice by publication in a newspaper published at the place of business of the firm, of its dissolution or the withdrawal of a member, is sufficient; but as to those who have had previous dealings with it, actual notice or its equivalent must be shown, to protect the retiring member from liability for debts subsequently incurred in the firm name.

3. SAME—*notice of dissolution by mail—presumption.* Proof of the mailing of notices of the dissolution of a partnership and of the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm, is *prima facie* evidence that the notices have been received by the parties to whom they were addressed; but such presumption may be rebutted by proof that they were not received.

Syllabus.

4. PLEADING—*effect of a traverse, as properly denying the allegations in a prior pleading, or, as amounting to an admission.* In an action against several as partners, where the plaintiff's replication to a plea denying the joint liability of one of the defendants as a partner, alleging that for two years prior to the contracting of the indebtedness sued on, such defendant was a partner, during which time plaintiff dealt with such firm and gave it credit, and that at the time the debt sued on was contracted in the firm name, the plaintiff had no notice that such defendant had ceased to be a member of the firm, a rejoinder traversing the allegations of the replication is good. But if the replication further alleges that at the time of contracting the debt sued on, the defendant so claiming to have retired from the firm, and one of his co-defendants, constituted one firm, and that such firm sued was composed of his firm and two others sued, the rejoinder will be bad, as admitting his joint liability.

5. And where a replication to such a plea alleges that up to a day named the defendants were partners, and as such had dealings with the plaintiff, and that after that date he, without notice of the withdrawal of such defendants from the firm, gave the firm credit, and the defendants rejoin that at the time of making the promises they had ceased to be such partners, of which fact the plaintiff had notice, etc., this will, so far as the issue on such rejoinder is concerned, constitute an admission of record of the existence of the partnership up to the day and date named in the replication.

6. EVIDENCE—*question assuming the existence of particular facts.* On an issue as to the joint liability of two defendants as partners, one of them testified quite fully as to their withdrawal from the firm, and to the fact of having given the plaintiff both general and special notice of such withdrawal before the credit was given to the partners left after such withdrawal, who continued the firm name, and he was then asked what other steps he took to notify the parties with whom the old firm had been dealing, of the dissolution of the firm: *Held*, that the question was objectionable, as assuming that some other steps than those mentioned had been taken.

7. PRESUMPTION *to sustain a judgment.* On an issue of fact as to the giving of notice of the dissolution of a firm, where the evidence of the defendants show the mailing of such notice to the plaintiff, properly addressed, and that of the plaintiff that it never was received, and the jury find for the plaintiff, it will be presumed in favor of the judgment below that the jury found, as matter of fact, that such notice was never received.

8. ERROR—*what may be assigned as error.* A party can not assign for error the exclusion of evidence offered by him, which, if admitted, would establish the issue in favor of his adversary.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Adams county; the Hon. JOHN H. WILLIAMS, Judge, presiding.

This was an action of assumpsit, brought by Moses Krohn and Leopold Feiss, partners, under the firm name of Krohn, Feiss & Co., against John Meyer and Moses Bachrach, together with Solomon Hoffheimer and Eva Hoffheimer, as partners, doing business at Galesburg, Illinois, under the firm name of Hoffheimer & Co.

The declaration contains six special counts on as many bills of exchange accepted by Hoffheimer & Co., and also the common counts. The first of these bills was dated August 12, 1879, and the last November 10, 1879. Appellees, subsequent to August 12, 1879, sold merchandise to Hoffheimer & Co. John Meyer pleaded in abatement, denying the defendants' partnership as alleged, and averring that the several promises in the declaration mentioned, if made, were made by Solomon and Eva Hoffheimer, under the firm name of Hoffheimer & Co., and not by himself and his co-defendants, as alleged. Bachrach filed a separate plea precisely the same as that of Meyer. To each of these pleas the plaintiffs filed replications, as follows:

First—A traverse of the allegations of said pleas, concluding to the country, upon which issue was joined.

Second—A special replication that before the making of the promises in the declaration mentioned, on, to-wit, the 1st day of January, 1878, and for two years prior thereto, the defendant John Meyer was a partner in business with his co-defendants, under the firm name of Hoffheimer & Co., and that at divers times during the said two years, the plaintiffs, together with one Louis Krohn, who was then, but before the making of the said promises ceased to be, a partner in business with the plaintiffs, under the firm name of Krohn, Feiss & Co., sold goods and extended credit to the said John Meyer and his co-defendants, under the firm name of Hoffheimer & Co., and further averring that at the time of the making of the said promises the plaintiffs had had no notice that the said John Meyer had ceased to be a partner with his co-

defendants, under the firm name of Hoffheimer & Co., concluding with a verification.

To these two special replications each of the defendants filed two rejoinders:

First—The first denying that on the said 1st day of January, 1878, he was, or ever had been, a partner of his co-defendants, under the firm name of Hoffheimer & Co., but averring that at the said time, to-wit, January 1, 1878, he and his co-defendant, John Meyer, were partners, under the firm name of John Meyer & Co., and that the said firm of Hoffheimer & Co. was composed of the said Solomon Hoffheimer and Eva Hoffheimer and the said firm of John Meyer & Co., and not of the said Moses Bachrach and his co-defendants, as alleged in the replication, concluding with prayer of judgment, and that the writ and declaration be quashed.

Second—The second averring that at the time of the making of the promises in the declaration mentioned, he had ceased to be a partner in business with his co-defendants, under the firm name of Hoffheimer & Co., of which the plaintiffs before the making of the said promises did have notice, concluding to the country, upon which issue was taken.

To the first rejoinders of both John Meyer and Moses Bachrach, the plaintiffs demurred specially, which demurrer was sustained, and defendants abided their rejoinders.

Mr. WILLIAM W. BERRY, and Messrs. DAVIS & POLING, for the appellants:

The rule of law, if not already so, should be, that the notice of the dissolution addressed and mailed, postage prepaid, to correspondents at a distance, should suffice to discharge the retiring members of a firm from liability for debts thereafter incurred. This rule is not restricted to notice of the dishonor of negotiable paper. *Dunlap* v. *Higgins*, 1 H. L. Cases, 381; *Harris case*, 20 W. R. 690; *Jenkins* v. *Blizzard*, 1 Starkie, 418.

Where a partner retires from a firm, notice is usually given by public advertisement, or by letters to the customers of the firm, or both. (Parsons on Contracts, 169.) To require more would be unreasonable, if not impracticable.

But the rule as to actual notice has no application, for the reason that appellees never had any dealings with Hoffheimer & Co. prior to the dissolution of that firm in January, 1878. Louis Krohn, together with appellees, constituted the firm of Krohn, Feiss & Co. at that date. A year thereafter, and six months before the creation of the present indebtedness, Louis Krohn retired from the firm, and by this act the old firm of Krohn, Feiss & Co. was dissolved. Parsons on Partnership, 415; Story on Partnership, secs. 269, 272; 3 Kent, 53; *Bank of Mobile* v. *Andrews*, 2 Sneed, 535; *Mudd* v. *Bart*, 34 Mo. 465.

In the second replication it was averred that appellants had been partners, etc. In the first rejoinder thereto this was denied, and the averment made that at the time stated in the replication, John Meyer & Co., of which firm appellants were members, were partners with the Hoffheimers, under the name of Hoffheimer & Co., and the rejoinder was sworn to. It was, in everything save the name, a plea in abatement. The statement in it was literally true, as the articles of co-partnership of Hoffheimer & Co. were between the Hoffheimers and John Meyer & Co. The court erred in sustaining the demurrer to this rejoinder.

The court erred in disallowing the question, "State what other steps you took to notify the parties with whom the firm of Hoffheimer & Co. had been dealing, of the dissolution of the firm." This ruling precluded the defendant from making all the defence that was legitimate.

The partnership articles between the Hoffheimers and John Meyer & Co. should have been admitted to show by what authority the signature of John Meyer & Co. was attached to the contract of dissolution.

The court erred in refusing to admit in evidence the conversation with Gideon, an agent of the plaintiffs, as notice to him was notice to the principals. *Page* v. *Brant*, 18 Ill. 37; *Hottgrave* v. *Wintker*, 85 id. 470.

Messrs. CARTER & GOVERT, for the appellees:

The rejoinder to the second replication was bad in substance, in setting up in abatement that the firm of Hoffheimer & Co. was composed of two individuals, Solomon and Eva Hoffheimer, and another firm, John Meyer & Co., which in turn was composed of appellants.

A partnership is a combination of two or more persons. Parsons on Partnership, 6; Collyer on Partnership, sec. 3; 3 Kent's Com. 24.

As to persons having previous dealings with the firm, actual notice is necessary to relieve a retiring partner from further liability. *Whiteside* v. *Lee*, 1 Scam. 550; *Page* v. *Brant*, 18 Ill. 38; *Warren* v. *Ball*, 37 id. 76; *Hottgrave* v. *Wintker*, 85 id. 470; *Hicks* v. *Russell*, 72 id. 230; *Austin* v. *Holland*, 69 N. Y. 246; *Haynes* v. *Carter*, 12 Heisk. 7; *Rose* v. *Cofield*, 53 Md. 18; *Mitchum* v. *Bank of Kentucky*, 9 Dana, 166; *Prentiss* v. *St. Clair*, 5 Vt. 156; *Kenney* v. *Altwater*, 77 Pa. St. 34.

Mailing notice of dissolution of partnership to one who has had dealings with the partnership, would be a step in the direction of actual notice, but the question whether it was received or not is a question of fact for the jury, and not a question of law. And proof that the letter was not returned from the dead letter office, does not establish its receipt by the customer. (*Kenney* v. *Altwater*, 77 Pa. St. 34.) To make notice to an agent notice to the principal, it must be shown the agent had authority to represent the principal in such matters. (*Stewart* v. *Sonneborn*, 49 Ala. 178.) And the agent must be acting within the scope of his agency, and must relate to the business in which he is engaged. *Conger* v. *Railroad Co.* 24 Wis. 157.

MR. CHIEF JUSTICE MULKEY delivered the opinion of the Court:

Moses Krohn and Leopold Feiss, wholesale merchants at Cincinnati, Ohio, doing business as partners, under the firm name of Krohn, Feiss & Co., brought to the June term, 1883, of the Adams county circuit court, an action of assumpsit, against John Meyer, Moses Bachrach, Solomon Hoffheimer and Eva Hoffheimer, as partners, lately doing business at Galesburg, Illinois, under the name and style of Hoffheimer & Co. The declaration was in the usual form, containing the common counts and six special counts, on bills of exchange payable to appellees, and drawn by them upon and accepted by Hoffheimer & Co. The bills were given at different times, in due course of trade, for goods and merchandise sold by the plaintiffs to the defendants. The first of these bills bears date August 12, 1879, and the last, November 25 of the same year, and the whole series, interest included, together with a small account, amounts, in the aggregate, to near $1100. The Hoffheimers made no defence. The appellants severally filed pleas in abatement, denying the partnership at the time of making the bills of exchange and the purchase of the goods sued for. The plaintiffs traversed these pleas, and also severally replied, in substance, that appellants, on the 1st day of January, 1878, and for two years prior thereto, were members of the firm of Hoffheimer & Co., during which two years appellees had sold goods to said firm, and that at the time of making the said bills of exchange, etc., appellees had no notice that appellants had ceased to be members of the firm of Hoffheimer & Co. Appellants took issue on these replications, and also severally rejoined that they were, during the said two years, as between themselves, partners, under the firm name of John Meyer & Co., and that this firm and their co-defendants composed the firm of Hoffheimer & Co., and that the appellants were not otherwise members of the latter

firm. The court sustained demurrers to these rejoinders, and the appellants stood by them. By a second rejoinder the appellants severally alleged that at the time of the making of the alleged promises sued on, the appellees did have notice of the withdrawal of the appellants from the firm of Hoffheimer & Co., concluding to the country. The cause was then tried upon the issues formed as above stated, resulting in a verdict and judgment in favor of plaintiffs, for $1093.21. On appeal to the Appellate Court for the Third District this judgment was affirmed, and the present appeal brings before us for review the judgment of the latter court.

The first point made by appellants questions the correctness of the ruling of the trial court in sustaining a demurrer to appellants' rejoinder to appellees' second replication. We have no doubt of the soundness of the ruling of the court on that question. Had the rejoinder concluded with the denial contained in it of the averment in the replication, to the effect that appellants had been members of the firm of Hoffheimer & Co., it would have been good as a mere traverse of the replication. But the effect of this denial, considered as a mere traverse, is entirely neutralized by the additional allegation "that the said firm of Hoffheimer & Co. was composed of the said Solomon Hoffheimer and Eva Hoffheimer, *and the said firm of John Meyer & Co.*" Now, as the firm of John Meyer & Co. could have no existence outside of the appellants, who composed it, the conclusion is manifest that they were also members of the firm of Hoffheimer & Co.,—so that in truth the rejoinder, instead of presenting any defence to the matter set up in the replication which it assumed to answer, was and is, when taken as a whole, a substantial admission of the facts therein stated. In thus holding, we at the same time recognize the right of a third party to contract with a particular member of a firm for an interest in his share of the profits without making himself a member of the firm. Thus, if A and B are partners, C may purchase an interest

in A's share of the profits without making C a partner with A and B. But the rejoinder in question presents no such case as this. As indicated by the pleadings, and as the evidence tends to show, appellants were members of the firm of Hoffheimer & Co. prior to the 2d of January, 1878, and, as such members of the firm, were customers of appellees. On that day appellants withdrew from the firm, but the business continued to be carried on by the Hoffheimers just as it had been before, and as claimed by appellees, without any notice of appellants' retirement from the firm. Whether appellees had such notice or not, was put directly in issue by the pleadings, and this was the controlling question in the case. The question of fact thus put in issue has been decided adversely to appellants, and this court is not permitted to review it.

Appellant Bachrach, when upon the stand as a witness, after having testified very fully as to his and Meyer's withdrawal from the firm, and to the fact of having given to appellees both general and special notice of such withdrawal, was asked this additional question: "State what other steps you took to notify the parties with whom the firm of Hoffheimer & Co. had been dealing, of the dissolution of the firm," —which the court, on objection, held improper, and this is assigned for error. The question was clearly objectionable, on the ground it assumed that some other steps than those mentioned had been taken. But waiving this objection, it is clear the appellants could not have been injured by the ruling of the court in this respect, for, as just stated, the witness had already fully set forth, with great particularity, the fact of notice, and the different ways in which it had been given. Moreover, the same question, differing somewhat in form, was subsequently put to and answered by the witness.

It is also objected the court erred in refusing to permit the articles of co-partnership to be read in evidence to the jury. Had they been offered by appellees, we are of opinion they would have been competent evidence under their first repli-

cation, which simply put in issue the pleas of the defendants denying the partnership. But how the appellants could have been injured by the ruling of the court it is difficult to perceive. Upon the issue made by the first replication the appellees were bound to prove the partnership, and the articles of partnership themselves were certainly the most available evidence for that purpose. So far as that issue is concerned the admission of them in evidence, at the instance of appellants, would have been but permitting them to establish appellees' case. The fact the court refused to allow them to do this, certainly affords no ground for complaint on the part of the appellants. So far as the issue made by the second rejoinder to the second replication is concerned, the fact that the partnership existed up to the 2d of January, 1878, is admitted on the record by both parties, and hence the evidence offered was irrelevant under that issue.

The point is also made that the court erred in refusing to permit Jacob Hoffheimer, a witness on behalf of appellants, to detail a conversation which he claimed to have occurred, only a month or so after the dissolution, between himself and Joseph Gideon, an alleged traveling salesman of appellees. The object of the proposed evidence was to prove appellees had notice of the dissolution of the partnership. There is nothing in this objection, for the record clearly shows that so far as notice could be established in this manner by Hoffheimer's testimony, it was done. He says: "Representatives of the house of Krohn, Feiss & Co. visited Galesburg after this dissolution. We have been dealing with them right along. Joseph Gideon, one of them, to the best of my recollection,—I can't say exactly when,—visited Galesburg on one of his regular trips,—it must have been two or three months after the dissolution. On this trip I had a conversation with him in reference to the dissolution of the firm. I think he (Gideon) had knowledge of the dissolution, from a personal conversation I had with him. * * * When I notified him of this dis-

solution, Gideon was representing the house of Krohn, Feiss & Co., and selling goods for them. The new firm of Hoffheimer & Co. bought goods from Krohn, Feiss & Co. through Gideon, at that time. These goods were shipped to and received by Hoffheimer & Co., and a bill was rendered for them. At the time of the conversation above alluded to, we spoke about the matter of the dissolution of the firm, and Gideon said that the credit would be just as good for the new firm, or something to that effect. I asked him if he thought the credit would be just as good as before the Quincy house withdrew, and he thought it would." Thus, notwithstanding the ruling of the court complained of, it is clear this witness told all he knew on that subject, and the conversation as to other matters, of course, would have been improper. Moreover, the weight of evidence seems to show that at the time of the alleged conversation Gideon was not in the employ of appellees at all, and they consequently would not have been bound by anything Hoffheimer may have told him. In addition to all this, the court afterwards told the witness he could state to the jury the whole conversation between him and Gideon, so there is not the slightest cause for complaint on the ground suggested.

Other points are made in appellants' brief, of a similar character, none of which we regard as well taken, or of sufficient importance to require special notice.

The evidence relating to the question of notice of appellants' withdrawal from the firm is circumstantial, and by no means conclusive. That a general notice was prepared and inserted in a newspaper published in Galesburg, at the time of their withdrawal, is conceded, and that a copy of this notice was mailed at Galesburg by appellants, in an envelope properly addressed to appellees at Cincinnati, their place of business and residence, is proven by the testimony of appellants. That no such notice was ever received by appellees is established just as clearly by their testimony. This question, with

other questions of fact, was properly left to the jury. If, as matter of law, in order to relieve appellants from further responsibility, it was necessary for them to prove, not only the preparing and mailing of the notice of their withdrawal, but also that it was actually received by appellees, then, for the purpose of supporting the judgment below, we must assume that the jury found, as matter of fact, that the notice was never received. The important question in the case, so far as this court is concerned, is, whether the law is as just suggested, and this question is presented by the instructions, both given and refused.

The court, on behalf of appellees, instructed the jury, in substance, that although they might believe, from the evidence, that the appellants prepared and sent, in a letter or envelope properly addressed to the appellees at Cincinnati, a notice of their withdrawal from the firm, yet if they further believed, from the evidence, that appellees never received such notice, and that neither they nor their lawfully authorized agent otherwise received notice, or had knowledge of such withdrawal or dissolution of the firm, then the appellants had failed to establish notice, within the meaning of the law. On the other hand, the court refused to instruct the jury, at the instance of the appellants, that it was sufficient, for the purpose of establishing notice, to prove the preparing and sending a notice in the manner above stated. We have no doubt of the correctness of the ruling of the court on this subject. The general rule, as we understand it, is this: As to persons who have never had any business transactions with the firm, notice by publication is sufficient; but as to those who have had previous dealings with it, actual notice, or its equivalent, must be shown. This rule seems to be supported by an unbroken current of authority, and it is certainly promotive of justice and fair dealing. To hold that the mere mailing of notices to patrons of a firm is sufficient, without regard to whether they were ever received or not, as

is claimed by appellants, would be to establish, by judicial legislation, a species of constructive notice hitherto unknown to the law, so far as we are advised. It is doubtless true that proof of the mailing of notices, properly addressed, is *prima facie* evidence of their having been received by the party addressed; but this is a mere presumption of fact, which may be rebutted, as was done in this case. To give it the effect contended for, would be to declare it a *presumptio juris et de jure*, for which we find no authority. Moreover, it would be but to invite the grossest frauds upon distant merchants, who would have no adequate means of protecting themselves. We prefer to leave the question with the jury, where we understand the law leaves it, unfettered and unembarrassed by any artificial rule of evidence that might prevent them from finding the real truth.

Perceiving no cause for disturbing the judgment of the Appellate Court, it will therefore be affirmed.

Judgment affirmed.

Mr. JUSTICE SHOPE took no part in the consideration of this case.

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114 586
24a 434

THOMAS B. SHAW

v.

AZILDA SHAW.

Filed at Ottawa November 14, 1885.

1. STRIKING ANSWER *in chancery from the files—in suit for divorce.* It is error to strike a defendant's answer to a bill of divorce from the files, after it has been filed by counsel, merely upon proof of a communication sent by the defendant to his solicitor, which the latter never received, to let the suit go by default.

2. ALIMONY—*whether by annual allowance, or land in fee.* Under the decisions of this court the practice has been, unless for special reasons,—as,

Statement of the case.

where the property has been bought with the wife's money, or where the proof shows the property has been accumulated by the personal labor of the wife,—to give her an annual allowance or life estate in the real property of the husband, to be held under the control of the court, and not to give her the fee to the husband's real estate as alimony, on a decree of divorce.

WRIT OF ERROR to the Circuit Court of Jo Daviess county; the Hon. WILLIAM BROWN, Judge, presiding.

This was a bill for divorce, brought by the appellee, against the appellant, alleging extreme and repeated cruelty, and habitual drunkenness, for a period of over two years. The defendant, by his counsel, filed his answer to the bill, denying the material charges, and charging her with improper conduct and neglect of duty, and alleging condonement of all grounds of complaint up to a day stated.

In the absence of the defendant and his counsel, the court heard the following testimony, to-wit: James H. Goard says: "I am deputy sheriff of Jo Daviess county, Illinois, and well acquainted with Thomas B. Shaw, the defendant. On November 14, 1884, I had a conversation with Shaw, in which he told me he would not appear or make any defence in this cause, and directed me to see Moses Rees, his attorney, who had filed his answer, and tell him to let the case go by default. I communicated this to Rees, who replied that he would pay no attention to it, and would go on with the case unless he received a written order from Shaw. On November 24, 1884, I had another conversation with Shaw, in which he read to me the letter hereto attached, marked 'Exhibit A,' and said, 'Give this to Mr. Rees,—I guess that ought to satisfy Mr. Rees.'"

The letter is as follows:

"ELIZABETH, ILL., ———, 188–.

"Mr. REES—*Kind Sir:* Please let that suit go by default, and oblige.

T. B. SHAW."

It was indorsed, "filed Nov. 24, 1884." Thereupon the court ordered the answer to be stricken from the files, and the defendant's default was taken.

Messrs. BEDFORD & REES, for the plaintiff in error.

Messrs. D. & T. J. SHEEAN, and Mr. MCHUGH, for the defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

It was error to strike the answer of defendant from the files, and render a decree against him as on default. It had been filed by counsel, and presumably with the consent of defendant. It was not withdrawn by defendant, nor by his counsel, in open court, nor by any written communication addressed to the court. The only written authority from defendant was a letter or note directed to his counsel, but which was never delivered. Had it been delivered to his counsel, as it was expected would have been done, on further consultation it might have been deemed best to allow the answer to stand. Be that as it may, there was no sufficient reason shown for striking the answer from the record.

In the decree providing alimony for complainant, the court vested the fee of certain lots, on which there were situated a hotel, barn, and other buildings, in her, on condition she would pay to defendant the sum of $500, in sums of $50 every six months, from the entering of the decree until the whole sum should be paid. There is no evidence in the present record that would seem to warrant the divestiture of the fee of the real estate that was in the husband, and placing it in the wife. Under the decisions of this court, the practice has been, unless for special reasons,—as, where the property was bought with the wife's money, and, it may be added, in cases where the proof shows the property was accumulated by the personal labor of the wife,—to give her an annual

allowance or life estate in the real property, to be held under the control of the court. Nothing contained in this record would warrant a departure from the rule so generally observed in such cases. There would seem to be some equitable consideration, in support of the decree in this respect, but as the case now comes before this court there is nothing that would warrant a departure from the usual rule on this subject. *Keating* v. *Keating*, 48 Ill. 241; *Ross* v. *Ross*, 78 id. 402; *Von Glahn* v. *Von Glahn*, 46 id. 136.

The decree will be reversed, and the cause remanded.

Decree reversed.

HENRY H. GAGE

v.

CHRISTIAN C. BUSSE *et al.*

Filed at Ottawa November 14, 1885.

1. REDEMPTION FROM TAX SALE—*under the statute—upon what terms —and within what time.* The statute, except as to persons under disability, makes no provision for redemption after the expiration of two years from a sale of land for taxes. Where the redemption is made after that time by one under a disability, he is required to pay ten per cent on double the amount of the sale from and after the expiration of such two years.

2. SAME—*in equity.* Where a court of equity allows a redemption from a sale of land for taxes, on the ground that the amount of the sale includes illegal taxes, the party redeeming will be required to pay the redemption money allowed by the statute on the amount of the legal taxes and costs, and six per cent upon the redemption money from the expiration of the time for redemption fixed by the statute, and all taxes paid by the purchaser after the two years allowed for redemption, with six per cent thereon.

3. JUDGMENT FOR TAXES—*how far conclusive as to legality of taxes.* A judgment of the county court against lands for taxes, where there is no personal appearance of the owner, is not conclusive as to the legality of all the taxes included in it, but is open to attack collaterally.

114 [illegible] 141 285
114 589
202 484

Briefs of Counsel.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. A. N. Gage, for the appellant:

This court, on a former appeal, held that appellees could only be entitled to relief upon their paying the redemption money allowed by the statute, while the decree herein grants relief upon paying a less amount. *Gage* v. *Busse*, 102 Ill. 592.

The statute provides for redemption from tax sale after the expiration of two years from the date of sale, upon payment of ten per cent per annum on double the amount for which the land was sold, from and after the expiration of the two years. Rev. Stat. 1874, chap. 120, sec. 210.

The county court having general original jurisdiction of the subject matter and the *res*, with power and authority to investigate and determine whether taxes are due, and the amount of the delinquency, its judgment upon these questions must be conclusive while it remains in operation. *Mays* v. *Ahloy*, 32 Cal. 479; *Porter* v. *Purdy*, 29 N. Y. 106; *People* v. *Brislin*, 80 Ill. 423; *Andrews* v. *People*, 84 id. 28; *Railroad Co.* v. *People*, 83 id. 467; *Graceland Cemetery Co.* v. *People*, 92 id. 619.

The action of the county court in such matters is *in rem* against the real estate. Rev. Stat. 1874, chap. 120, sec. 191; *Pidgeon* v. *People*, 36 Ill. 249; *Chesnut* v. *Marsh*, 12 id. 173; *Spellman* v. *Curtenius*, id. 409; *Olcott* v. *People*, 5 Gilm. 481; *Brown* v. *Joliet*, 22 Ill. 123; *People* v. *Nichols*, 92 id. 517; *St. John* v. *East St. Louis*, 50 id. 92; *Atkins* v. *Hinman*, 2 Gilm. 437.

Mr. JOHN P. WILSON, and Mr. JAMES E. MUNROE, for the appellees:

The terms upon which the decree gives relief are in conformity with the opinion of this court upon the former appeal, and do full justice to the appellant.

In no other case has this court required the land owner to pay more than the amount of the legal taxes for which his land has been sold, and six per cent simple interest thereon. *Phelps* v. *Hardin*, 87 Ill. 442; *Barnett* v. *Cline*, 60 id. 205; *Reed* v. *Tyler*, 56 id. 288; *Gage* v. *Nichols*, 112 id. 269; *Gage* v. *Hervey*, 111 id. 305; *Wilmerton* v. *Phillips*, 103 id. 78.

The judgment of the county court is not conclusive as to the legality of all the taxes included therein, there being no personal appearance. *McLaughlin* v. *Thompson*, 55 Ill. 249; *Belleville Nail Co.* v. *People*, 98 id. 399; *Gage* v. *Bailey*, 102 id. 11; *Stamposki* v. *Stanley*, 109 id. 210.

There is another class of cases arising upon the effect of a judgment of court confirming a special assessment, in which this court has held that the order of confirmation was final and conclusive as to all questions which might have been raised upon the application for a confirmation. The following are some of the cases involving this point, all of which are relied upon by counsel for appellant: *People* v. *Brislin*, 80 Ill. 423; *Lehmer* v. *People*, id. 601; *Prout* v. *People*, 83 id. 154; *Gage* v. *Parker*, 103 id. 528.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in equity, brought by appellees, against appellant, before the time for redemption had expired, to set aside certain tax sales, because certain of the city taxes of the city of Chicago, included in the judgments for the sales, were illegally levied by the city, and under which judgments appellant's assignor had purchased. A former decree in the case, in favor of appellees, was reversed by this court at the March term, 1882, upon the ground that the terms upon which the decree granted relief were incorrect. (See *Gage* v. *Busse*, 102 Ill. 592.) The cause was remanded, and a second decree entered by the Superior Court, which was affirmed by the Appellate Court for the First District, and the present appeal taken.

Appellant makes two points against the decree, the first of which is, that the decree is not in conformity with the former opinion of this court in respect of the terms of relief. It was said in that opinion: "The decree ought to have been, that complainants be allowed to redeem from the sale by paying the redemption money allowed by the statute, had the judgment and sale been for the proper amount of taxes, which can be readily ascertained by deducting the erroneous tax from the amount of the judgment." By section 210, chapter 120, of the Revised Statutes of 1874, page 892, the right of redemption must be exercised (except in the case of persons under disability) within two years from the date of the sale, and the party redeeming is required to pay the amount for which the land was sold, and a penalty of twenty-five per cent for each six months of the two years after the date of the sale, and all taxes paid by the purchaser within two years from the sale, with ten per cent interest thereon. This is "the redemption money allowed by the statute," and the decree, after deduction of the illegal taxes, requires the payment of all this, as so provided by the statute, and requires, in addition, the payment of six per cent interest on such redemption money from the expiration of the time of redemption fixed by the statute, and also payment of all taxes paid by appellant after the two years from the sales, with six per cent interest thereon. We are unable to see wherein there is want of conformity with the former opinion in this decree. It was payment of "the redemption money allowed by the statute" that was to be paid, and this is decreed. The statute (except in the case of persons under disability) makes no provision for redemption after the expiration of two years from the sale. By section 210, above referred to, minor heirs, idiots, etc., are permitted to redeem after their disability is removed, upon the terms specified in that section, and the payment of ten per cent per annum on double the amount for which the land was sold, from and after the expiration

of two years from the date of sale. It is supposed by appellant's counsel that this was the redemption to which the former opinion referred, and it is claimed that ten per cent interest should have been allowed on double the amount for which the land was sold, from and after the expiration of two years from the date of sale. This is clearly a misapprehension of the language of that opinion. No persons under disability were involved in the case, the decision was with respect to persons not under disability, and "the redemption money allowed by the statute," spoken of, had reference to the redemption money in the case of persons not under disability.

The other point made by appellant is, that the judgment of the county court, under which appellant's assignor purchased, is conclusive as to the legality of all taxes included therein,—that the judgment is *res judicata*, and can not be collaterally attacked. The owners of the property did not appear and file objections to the application for judgment in the county court. The decisions of this court have been such in number, and upon such due consideration, some of them, that a judgment for taxes, where there was no personal appearance, is not conclusive, and is subject to collateral attack, that we must adhere thereto as the settled doctrine of the court. See *McLaughlin* v. *Thompson*, 55 Ill. 249; *Belleville Nail Co.* v. *People*, 98 id. 399; *Gage* v. *Bailey*, 102 id. 11; *Stamposki* v. *Stanley*, 109 id. 210; *Riverside Co.* v. *Howell*, 113 id. 256.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

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THOMAS POOL *et al.*

v.

HENRIETTA BREESE.

Filed at Ottawa November 14, 1885.

1. TRIAL DE NOVO—*on appeal—effect as vacating judgment appealed from.* The effect of an appeal from an inferior to a superior tribunal, when the latter is required to try the question appealed from *de novo*, and render thereon such decision as in its opinion should be rendered under the law and the evidence, is to vacate and set aside the decision of the inferior tribunal. This applies to appeals from the orders of commissioners of highways on petition to lay out or vacate roads.

2. HIGHWAYS—*appeal from commissioners of highways to three supervisors—grounds of appeal—powers of the commissioners pending the appeal.* An appeal from the decision of commissioners of highways in respect to laying out, etc., of roads, may be taken on grounds affecting the jurisdiction of the commissioners and going to the validity of the entire proceedings, or it may be taken on grounds affecting the appellant, only. In the latter case the appeal will suspend only so much of the order of the commissioners as affects the party appealing.

3. Even the power to vacate proceedings to lay out a highway, conferred on the commissioners of highways by section 87 of the Road law, has been held to be suspended until the expiration of one year from the decision of the supervisors, on appeal,—that is, until the expiration of the time during which, by section 100, their decision in regard to laying out, altering, widening or vacating the road, or in refusing to do the same, is made final.

4. Where the grounds of appeal from an order laying out a highway go to the jurisdiction of the commissioners of highways, to the legality of their proceedings, and their failure to attempt to agree with the land owners in respect to damages, and to give notice of their application to have the damages assessed, and is also that the assessment of damages to the land owners is unjust, unfair and unlawful, its effect, though taken by only two land owners, is to vacate and set aside the entire order and decision of the commissioners as an entirety, and until the appeal is decided the commissioners have no authority of law to do any act to lay out or open any part of the road under their order.

5. During the pendency of an appeal from a decision of commissioners of highways laying out a road, to three supervisors, upon grounds affecting the validity of the order to lay out and open the road as an entirety, and until a final order is made and filed by the supervisors as required by the statute, neither the commissioners of highways nor those acting under them can law-

fully do any act to open any part of the road, even over the lands of land owners who did not join in the appeal, although the appellants may be estopped by their acts from afterward questioning the existence of the road as a legally laid out highway.

6. SAME—*action of the supervisors on an appeal—of the proper filing of the order to establish a road.* The making of an order for the laying out and opening of a public road by the supervisors, on appeal, and filing the same with a justice of the peace of the town, is not a compliance with the statute requiring the supervisors to file their order in the office of the town clerk, and the filing of a copy of such order by the justice of the peace with the town clerk will not cure the omission. Such order affords no justification for an entry upon the lands of a party and opening the proposed road. Compliance with the statute in proceedings to lay out roads, and in respect to the making and filing of the order authorizing the laying out and opening of the same, is mandatory.

7. SAME—*estoppel to deny the legal existence of highway—by joining in appeal, etc.* Where a party, after appealing from an order of the commissioners of highways for the laying out of a public road upon grounds going to the validity of the entire proceeding, and before the appeal was decided, agreed with the commissioners as to his damages for the right of way over his premises, and accepted the same, it was *held*, that this estopped him from denying the existence of the highway, no matter whether it was a lawful existence or not, but could not have that effect upon other persons over whose land the alleged road ran, and who did not join in the appeal.

8. SAME—*necessity of having authority to enter upon premises to open a highway—burden of proof.* Neither the commissioners of highways, nor others representing the public, have the right to enter the premises of another to lay out and open a highway, unless they can show a valid order of the commissioners conferring that authority, or a like order of the supervisors in case of an appeal to them. The burden is upon them to show, affirmatively, the existence of such order. Without it their acts are a nullity, and they become trespassers as to all persons not estopped by some act from denying the legal existence of such highway.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

This was a bill, filed by the appellee, to enjoin the appellants from opening what was claimed a newly laid out highway, they being commissioners of highways. A temporary injunction was granted, but on final hearing it was dissolved

and the bill dismissed. Upon the appeal of the complainant in the bill, the decree of the circuit court was reversed, and the cause remanded, with directions to enter a decree making the injunction perpetual. From this judgment the defendants in the bill prosecute this appeal.

Mr. M. T. MOLONEY, for the appellants:

From sections 98, 99 and 101 of the Road law of 1879, an appeal is allowed for the benefit of the party who prosecutes it. The parties taking it could, at any time, abandon or waive it, and thus have the order appealed from in full force. Section 88 of the same act requires the commissioners to file their final order in the town clerk's office within ten days after its date, and this may be conceded as mandatory. By section 99 the supervisors, on appeal, are given the same powers and authority as are conferred on the commissioners, and section 101 requires the supervisors to make a report of their proceedings and decisions in like manner as required by the commissioners. It does not say "within the same time," and if it so means it may be treated as directory. *Wheeler* v. *Chicago*, 24 Ill. 107; *Pond* v. *Negus*, 3 Mass. 000; *Cott* v. *Eves*, 12 Conn. 243; *Whalin* v. *Macomb*, 76 Ill. 52; *Town* v. *Town of Blackberry*, 29 id. 140; *Allison* v. *Commissioners*, 54 id. 170.

It is objected that the original order of the supervisors has never yet been filed, but only a certified copy thereof. In a collateral proceeding like this, mere errors not affecting the jurisdiction of the supervisors can not be availed of to defeat their order. *Henline* v. *People*, 81 Ill. 269; *Hankins* v. *Galloway*, 88 id. 156.

The filing with the town clerk of a certified copy of the order of the supervisors, in equity, is such a substantial compliance with the law as will sustain the proceedings of the supervisors. The failure to file the final order of the supervisors can not work a discontinuance. At most it leaves the

appeal still pending, and the fact that the appellants accepted their damages, operates as an abandonment of the appeal, leaving the order of the commissioners in full force.

Messrs. RICHOLSON & GENTLEMAN, for the appellee:

The burden of proof to justify the threatened invasion of appellee's rights, rests upon appellants to show, from the record, the *locus in quo* is a highway. *Green* v. *Green*, 34 Ill. 236; *Wragg* v. *Penn Township*, 94 id. 25; *McIntyre* v. *Storey*, 80 id. 129.

By the appeal the supervisors acquired jurisdiction, and became invested with all the powers of the commissioners. *Allison* v. *Commissioners*, 54 Ill. 172; *Wood* v. *Commissioners*, 62 id. 395.

Where the property of one is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law. *Supervisors* v. *Magoon*, 109 Ill. 150.

All questions as to the legality of proceedings to take private property will be considered in cases where the issues are the same as in this case. *Commissioners* v. *Supervisors*, 53 Ill. 320; *Anderson* v. *Wood*, 80 id. 15; *McPherson* v. *Holdridge*, 24 id. 38; *Hankins* v. *Galloway*, 88 id. 156.

The existence of a highway can be shown only by the record. When an appeal has been taken from the order of the commissioners to three supervisors of the county, the record of the proceedings of the supervisors, and their final order, properly certified, determine as to whether or not a legal highway exists. *Frizell* v. *Rogers*, 82 Ill. 109; *Hankins* v. *Galloway*, 88 id. 105; *Commissioners* v. *Barry*, 66 id. 499; *McIntyre* v. *Storey*, 80 id. 131; *Owens* v. *Crossett*, 105 id. 354; *Wood* v. *Commissioners*, 62 id. 395; *Commissioners* v. *Durham*, 43 id. 90; *Hyslop* v. *Finch*, 98 id. 183; *Commissioners* v. *Harper*, 38 id. 103; *Keech* v. *People*, 22 id. 482; *Corley* v. *Kennedy*, 38 id. 109; *Tower* v. *Pitstick*, 55 id. 117.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The questions in this case arise under the provisions of the Road and Bridge act, in force July 1, 1879. (Laws of 1879, p. 258, *et seq.*) By section 98 of that act, "any person interested in the decision of the commissioners of highways in determining to or in refusing to lay out, alter, widen or vacate any road, * * * or in the verdict of any jury," in "assessing damages in opening, altering * * * any road, may appeal from such decision to three supervisors of the county." Notice is required to be given within ten days, and a written petition must be presented to a justice of the peace, asking for the appeal, and stating on what grounds it is taken. The 99th section provides, that "upon such appeal the said supervisors shall have the same power and authority that is by this act conferred on the commissioners of highways, not only in regard to the laying out, altering, widening or vacating any road, but * * * to cause a jury to be called to assess damages." And by section 100 it is declared that the decision of such supervisors shall be final in regard to laying out, altering, widening or vacating such road, or in refusing to do the same, for one year after such decision.

Dominy and Lewis, who have appealed, stated in their petition praying an appeal, as the grounds upon which it was taken, the following: "First, the commissioners did not proceed according to law, nor take any of the steps required by the statute in such cases, to lay out said road, or give the proper notice, and therefore did not acquire jurisdiction of all the persons damaged by the laying out of such road, or the persons whose lands would be taken, nor did they acquire jurisdiction of the subject matter of said proceedings, and therefore had no authority to lay out said proposed road; second, said commissioners did not, twenty days after their first meeting to hear reasons for and against laying out said road, publicly announce and indorse on the petition a memo-

randum of such decision; third, said commissioners did not, before proceeding to ascertain and assess damages, cause a survey and plat of such of the road to be made, giving the courses and distances, and specifying the lands over which it should be laid out, but assessed the damages without such survey; fourth, after the damages were assessed they made a survey and drove stakes, whereby the original half-section line established by the government survey was changed twelve feet, wherefore damages were assessed to the owners by the government survey, and not with reference to the line fixed upon the ground by the new survey; fifth, the commissioners did not make any effort to agree with the land owners in regard to damages, nor did they cause the land owners to be notified that they would apply to some justice, giving the time and place when and where, to have a jury impaneled to assess damages; sixth, the assessment of the damages to the land owners was unjust, unfair and unlawful; seventh, the proposed road is unnecessary, and the public do not require it, and is an unreasonable burden upon the tax-payers of the township."

The effect of an appeal from an inferior to a superior tribunal, where, as here, the superior tribunal is required to try the questions appealed *de novo*, and render thereon such decision as in its opinion should be rendered under the law and the evidence, is to vacate and set aside the decision of the inferior tribunal. (See Freeman on Judgments, sec. 328, and cases cited in note.) In effect this rule has been applied by this court to proceedings like the present. (*Allison et al.* v. *Com'rs of Highways*, 54 Ill. 170; and see, also, *McPherson et al.* v. *Holdridge*, 24 id. 38.) Even the power to vacate the proceeding, conferred upon the commissioners of highways by the 87th section of the act, has been held to be suspended until the expiration of one year from the making of the order by the supervisors,—that is, until the expiration of the time during which, by the 100th section, their decision in regard

to laying out, altering, widening or vacating the road, or in refusing to do the same, is made final.

It will be observed that the appeal may be taken on grounds affecting the jurisdiction of the commissioners and going to the validity of the entire proceedings, or it may be taken on grounds affecting the appellant only; and in the latter case the appeal will obviously suspend only so much of the order of the commissioners of highways as affects the appellant. In the present case, the first, second, third, fourth, fifth and sixth grounds of appeal plainly present questions affecting the jurisdiction of the commissioners to take and condemn every part of the right of way, as against each and all of the respective land owners; and the seventh presents a question in which every tax-payer in the township has a like interest. If either the first, second, third or seventh grounds of appeal had been sustained, (waiving all questions that might arise upon sustaining either or all of the others,) the supervisors must have refused the prayer of the petition; and such refusal is, as has been seen, by the express terms of the statute, made to be binding and conclusive upon the commissioners, so that they can not thereafter proceed to lay out and open the road under their former order. Whether this result should be produced by the appeal of one or all of the land owners could not be material, for the scope and effect of the order is not, in the least, made to depend upon that question.

Conceding, then, this to be so, and that, as we have before herein said, the appeal vacates the order appealed from, it would seem it must follow, upon like principle, that where there is an appeal, like the present, upon grounds affecting the validity of the order to lay out and open the road as an entirety, while it is pending, and until a final order is made and filed by the supervisors as required by the statute, neither the commissioners of highways nor others can lawfully do any act to lay out or open the highway under or by virtue of the order of the commissioners from which the appeal is

taken. It is doubtless true that Mrs. Breese, not being a party to this appeal, is not bound by it,—that is to say, that she can not be held to have waived or to be estopped by it in respect of rights as to which an appellant would be held to be affected by waiver or estoppel. But we have seen that the commissioners are bound by it. They, nor others representing the public, have power to enter upon the land of Mrs. Breese to lay out and open a highway, unless they can show a valid order of the commissioners of highways conferring that authority, or a like order of three supervisors, in case of appeal from the order of the commissioners. The burden is upon them to show, affirmatively, the existence of the order. *Without it* their acts are a nullity, and they are trespassers. The question is not what rights she derives from the appeal, but, how does the appeal affect the order under which the commissioners attempt to justify.

Assuming that we are thus far correct, the further question arises and is discussed in the arguments before us, whether Mrs. Breese is not concluded, as to the record under which the commissioners seek to justify, by an estoppel. The estoppel is claimed to arise thus: Dominy and Lewis alone appealed from the order of the commissioners of highways. Their appeal was taken on the 11th of August, 1882, and the only action that it is pretended was ever taken thereon by the supervisors to whom the appeal was taken, was on the 25th of the same month. On the 2d of July, 1883, ten months and seven days after this pretended action of the supervisors, the commissioners of highways paid Dominy and Lewis, each, a sum of money, which each accepted in satisfaction of the damages sustained and to be sustained by him in consequence of the laying out and opening of this highway. This could not affect the appeal, nor any action thereunder, of the supervisors, for the obvious reason that it was long subsequent. Whatever effect the appeal or the order of the supervisors thereon could produce, had been produced before that time.

If the appeal vacated the order of the commissioners, it had been vacated, and the supervisors had either made an order *de novo*, or had neglected to do so, and the rights of the commissioners and others, with reference to such action or non-action, had become fixed before that time. The estoppel was personal to Dominy and Lewis, and to their privies, only. By accepting the money they are precluded from denying that it was lawfully paid to them. They admit, by that act, the existence of the highway, whether it be true or not that it lawfully existed before. But as to others than them or their privies, whose mouths are not thus closed, the commissioners must show affirmatively a record justifying their acts,—and this estoppel is not a record. Filing the order of the supervisors with the justice of the peace was not a compliance with the statute, and the act of the justice of the peace in filing the copy with the town clerk was entirely extra-judicial. With the wisdom of the policy adopted by the statute in this respect, we have nothing to do. Compliance with the law in proceedings of this kind, and in respect of the making and filing of the order authorizing the opening and laying out of the highway, is mandatory. *Hyslop et al.* v. *Finch*, 99 Ill. 183, and authorities there cited.

Inasmuch as no order authorizing the opening of the highway has ever been filed by the supervisors in the office of the town clerk, the commissioners of highways fail to show authority to open the highway across the land of Mrs. Breese; and it would moreover seem, on the authority of *Commissioners* v. *Barry*, 66 Ill. 496, that jurisdiction to hereafter make such order is lost.

We perceive no cause to disagree with the Appellate Court in the conclusion which it reached, and we concur in the views expressed in the opinion filed in that court. Its judgment must therefore be affirmed.

Judgment affirmed.

Syllabus. Statement of the case.

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CHARLES S. SIMPSON *et al.*

v.

ASA H. SIMPSON *et al.*

Filed at Springfield September 23, 1885.

1. ADVANCEMENT—*by father to son—death of the latter in the lifetime of the former—rights of children of the son—the statute construed.* The acceptance by a son of a conveyance of land from his father, in satisfaction of his share as prospective heir in the father's estate, will not only bar his own right to share in the distribution of the father's estate, real and personal, but also that of his children, in case he should die before his father.

2. The fourth section of the act of 1872, to the effect that if a child receiving an advancement from his father dies before the father, leaving issue, the amount thereof shall be allowed accordingly by the representatives of the son so advanced, as so much of their share of the estate, the same as if the advancement had been made directly to them, is not confined to cases of advancements made to a son after such act took effect, but applies equally to advancements made before that time, when the party making the same dies after the law took effect.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE GARDNER, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the First District, reversing a decree of the Superior Court of Cook county.

The case was submitted to the Appellate Court upon the following agreed state of facts: That John Simpson, Sr., departed this life intestate, December 3, 1880, leaving him surviving, his widow, and John Simpson, Jr., Andrew Simpson, George Simpson and Charles Simpson, his sons, and Rhoda Cox and Margaret Hammond, his daughters; that Amos P. Simpson, another son, died September 24, 1880, leaving him surviving Asa H. Simpson, Ida M. Simpson and Burnell Simpson, his children and only heirs-at-law; that Mary Pratt, another daughter of John Simpson, Sr., died

during the lifetime of her father, leaving her surviving, two daughters, Elizabeth Pratt and Frances Pratt, her only heirs-at-law. John Simpson, Sr., at the time of his death owned and possessed real estate and personal property, and an administration upon his estate was had in the probate court of Cook county, Illinois. In his lifetime he conveyed to John Simpson, Jr., certain real estate, and received back from him a release substantially like the one hereinafter set forth. He also conveyed to his sons Andrew Simpson and George Simpson certain real estate, with an express agreement between himself and them that the same was to be received by them in full of their respective shares in his estate. He also conveyed to Amos P. Simpson the land described in the following release, and the latter thereupon executed and delivered to his father said release in the words and figures following:

"In consideration of the conveyance to me this day of the W. ½, E. ½ of the S. E. ¼, and sixty rods in width taken from the E. side of the W. ½ of the N. E. ¼ of section number nine, 37 N. of R. 13 E. of the third principal meridian, in Cook Co., Ill., by John Simpson, my father, and Elsie Simpson, his wife, I do hereby release all claim and right which I have or may hereafter have or acquire as heir of said John Simpson, in all his estate, real and personal, in favor of the other heirs of said estate, except John Simpson, Jr., who has received his portion of said estate in the same manner as I have,—the conveyance to me of said premises as aforesaid being intended by my father, and accepted by me, in full satisfaction of all my interest in his estate.

"Witness my hand and seal this 29th day of January, A. D. 1855. AMOS P. SIMPSON. [Seal.]"

It is further stipulated that the only question presented by this appeal is, whether the release above set forth is legally sufficient to bar said Asa H. Simpson, Ida M. Simpson and Burnell Simpson from having any share or interest in the

estate of their grandfather, John Simpson, Sr. The Superior Court decided that question in the affirmative, and on the appeal of Asa H. Simpson, Ida M. Simpson and Burnell Simpson, the Appellate Court reversed the decree of the Superior Court.

Mr. E. F. RUNYAN, for the appellants.

Messrs. VAN ARMAN & VALLETTE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is well settled by the decisions of this court, that if Amos P. Simpson, the son of John Simpson, Sr., deceased, were now in life, he would himself, as heir, be barred of all claim and interest in his father's estate, from the acceptance by him from his father of a conveyance of real estate in full satisfaction of his share, as heir, in his father's estate. (*Parsons* v. *Ely*, 45 Ill. 232; *Bishop* v. *Davenport*, 58 id. 105; *Galbraith* v. *McLain*, 84 id. 379; *Kershaw* v. *Kershaw*, 102 id. 307.) Are the children and heirs of Amos P. Simpson in like manner barred, he having died in the lifetime of his father, John Simpson, Sr.? By our Statute of Descents the estate of a person dying intestate descends "to his or her children and their descendants, in equal parts, the descendants of a deceased child or grandchild taking the share of their deceased parents in equal parts among them." The latter clause is but the enactment of Blackstone's fourth canon of descents: "That the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor,—that is, shall stand in the same place as the person himself would have done had he been living. * * * And these representatives shall take neither more nor less, but just so much as their principals would have done. * * * This taking by representation is called succession *in stirpes*, according to the roots, since all the branches inherit the same share that their root, whom they represent, would have done." (2 Black. Com. 216, 217.)

Question might be made, as Amos P. Simpson had received full satisfaction of and given acquittance for his share in his father's estate, whether, within the language of the statute, there was any share of the deceased parent, Amos P. Simpson, for his children to take. Without dwelling upon this, we pass to other conideration.

At the time Amos P. Simpson received from his father this conveyance of real estate in satisfaction of his share in the father's estate, there was this provision of the statute upon the subject of advancement: "Where any of the children of a person dying intestate, or their issue, shall have received from such intestate, in his or her lifetime, any real or personal estate by way of advancement, and shall desire to come into the partition or distribution of such estate with the other parceners or distributees, such advancement, both of real and personal estate, shall be brought into *hotchpot* with the whole estate, real and personal, of such intestate; and every person so returning such advancement as aforesaid, shall thereupon be entitled to his or her just proportion of said estate." (Rev. Stat. 1845, p. 546, sec. 51.) This provision contains a clear implication that where there has been an advancement it shall debar sharing in the partition or distribution of an estate unless the advancement be returned. There appears here no offer of a return of the advancement. Under a Massachusetts statute, that where there had been advancements made they should be taken into consideration, and be deducted from the shares of the persons advanced, in the partitioning of intestate estate, it was held in *Quarles* v. *Quarles*, 4 Mass. 680, and *Kenney* v. *Tucker*, 8 id. 143, where a son received from his father a deed of real estate in satisfaction of his share in his father's estate, and the son died in the lifetime of the father, and afterwards the father died intestate, that it was an advancement to the son in full, and that the children of the son were barred from any share in the grandfather's estate.

But we have a statute that went in force July 1, 1872, (Laws 1871-72, p. 352,) which, by express enactment, meets the precise case at bar. Section 4 of the act is: "Any real or personal estate given by an intestate in his lifetime, as an advancement, to any child or lineal descendant, shall be considered as part of the intestate's estate, so far as it regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant towards his share of the intestate's estate; but he shall not be required to refund any part thereof, although it exceeds his share." Section 5 provides that if the advancement is in real estate, and its value is expressed in the conveyance or in the written acknowledgment thereof by the party receiving it, it shall be considered as of that value in the distribution of the estate, otherwise it shall be estimated according to its value when given. And section 8 is: "If a child or other descendant so advanced, dies before the intestate, leaving issue, the advancement shall be taken into consideration in the division or distribution of the estate of the intestate, and the amount thereof shall be allowed accordingly by the representatives of the heirs so advanced, as so much received towards their share of the estate, in like manner as if the advancement had been made directly to them." This last section makes the representatives of a person advanced, to be affected by the advancement in the same manner as if the advancement had been made directly to them,—so that the children of Amos P. Simpson would, under this statute, be barred in like manner as he himself would be were he now living.

It is objected that this statute does not apply because the advancement was made to Amos P. Simpson January 29, 1855, and that the legal effect of the advancement must be determined by the statute in force at the time it was made. But why so? The statute, in allowing it operation here, in nowise affects, to their injury, the rights of Amos P. Simpson or his father in respect of the advancement which had been

made, nor the contract which they had made. It was their contract that this land conveyed by the father to the son should be in full satisfaction of the son's share in the father's estate. Their purpose was, that neither the son nor his children should have any further interest in the father's estate, and that the remainder of the father's estate should all go to the other children unprovided for. The intent was, that this share of the estate should be extinguished as to all claimants. The statute provision that the son's children should be bound by the advancement received in the same manner as the son, was in aid of the contract between the father and son in giving it the precise effect which they intended. No rights of the son's children, he being then living, were affected by the passage of the act, with its application to advancements theretofore made. Such children had then, in their father's lifetime, no rights to be affected. It was entirely competent for the legislature, as respects any rights of appellees, to have enacted at that time that grandchildren should not inherit at all from grandparents; and it surely was not only unobjectionable, but highly proper legislation, that where a son had, by contract, received an advancement in full of his share in his father's estate, the children of the son, equally with himself, should be barred from inheritance in such estate. The statute is not, in terms, made in any way prospective in its operation,—to relate to cases of advancement thereafter to be made,—but it is enacted for the case of "any real or personal estate given by an intestate in his lifetime, as an advancement." When the grandfather, here, came to his death intestate, there was presented the case, under the statute, where a child, who had been advanced by the intestate in his lifetime, had died before the intestate, leaving issue; and we are of opinion the statute had operation as to such issue, without regard to the fact whether the time of making the advancement was before or subsequent to the passage of the statute. The statute had respect to the

amount, lessening it, which grandchildren, in a certain condition,—where an advancement had been made,—should inherit from grandparents, and was operative, we think, with respect to all grandchildren whom it found under such condition as named in the statute, at the time it was passed. The statute operated upon the existing state and condition of appellees at the time of the grandfather's death, and in so doing had no objectionable retroactive effect. This is the reasonable construction, in accordance with the terms of the statute, injurious to no existing rights at the time of the passage of the act, and the one which justice requires should be adopted.

It is claimed further that this court has decided that such a transaction as that between John Simpson, Sr., and Amos P. Simpson, is not an advancement, and reference is made to *Bishop* v. *Davenport*, and *Kershaw* v. *Kershaw*, *supra*, as so deciding. This is a misapprehension of those decisions. The question in those cases was, whether children who had received property under such an express contract as in this case, could, in disregard of their contracts, bring into *hotchpot* what they had received, and come in and share in the distribution of the estate,—and it was held they could not; that those were not such cases of advancement, under the statute, that the children who had thus received property upon an express contract that it should be in full satisfaction of their shares in their father's estate, could, after the death of the father intestate, bring what they had received into *hotchpot*, and claim the right to share in the distribution of his estate; that they were barred by the express contract which they had made, from all share in the estate. This was all that was, in fact, decided in those cases, or intended to be decided. There are not in the present case, as in the former ones, persons claiming to share in an estate in opposition to their express contract by which they had received property in full satisfaction of their shares in the estate. The conveyance

of land which Amos P. Simpson received from his father, was, in truth, an advancement,—something received from his father in anticipation of what he might receive by inheritance,—differing from a simple advancement in that it was an advancement in full, made such by the superadded express contract of the parties; and under the circumstances of this case, the advancement being regarded as one in full, the property conveyed can not be brought into *hotchpot*, and appellees can in nowise share in the distribution of the estate of John Simpson, Sr., deceased. As against the children of Amos P. Simpson, in order that they may be brought within the operation of this section 8 of the statute, we can have no doubt that what he thus received from his father should be regarded as an advancement, and that this is not inconsistent with any former holding of this court.

We are of opinion the Superior Court decreed rightly, and the judgment of the Appellate Court will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

Mr. JUSTICE SCOTT: I do not concur in this decision.

Mr. CHIEF JUSTICE MULKEY: While I concur in all that is said in the opinion in this case, I go further, and hold that notwithstanding the father of the grandchildren died before the intestate, the grandchildren must nevertheless take, if they take at all, *per stirpes*, and consequently their supposed rights are not and can not be superior to those of the father if he were living. As it is conceded if the father were now claiming instead of his children he would have no standing in court, it follows the situation of the latter is no better. The conclusion, then, to me, seems irresistible, that the statute relating to the subject is merely declaratory of the common law, and that in no view of the case are the grandchildren entitled to participate in the proceeds of the estate.

Syllabus.

MICHAEL JOHNSON

v.

SARAH C. JOHNSON.

Filed at Springfield November 14, 1885.

1. DIVORCE—*in case of a void marriage—former husband living.* A decree of divorce can not be had by the wife on the ground of desertion, if the complainant, at the time of the alleged marriage in respect of which the divorce is sought, had a husband then living, and the prior marriage had not been dissolved by divorce, although the former husband may have deserted her and had not been heard of by her for six years before her second marriage. In such case the second marriage is a nullity.

2. MARRIAGE—*its validity—presumptions in respect thereto—long continued absence of former husband.* Where a marriage in fact is shown, the law raises a strong presumption in favor of its legality, and the burden of proof is on the party contesting its validity to show that it is not valid.

3. So, although the presumption in favor of the validity of a marriage in fact, and of the innocence of the contracting parties, may conflict with that of the continued life of a former husband or wife not heard from for a period less than seven years prior to the second marriage, yet if neither presumption is aided by proof of facts or circumstances coöperating with it, the presumption of the validity of the second marriage must prevail over the other.

4. Where a woman, six years after her husband was last heard from, is married to another man, and the validity of the latter marriage is brought in question many years afterward, on the presumption that her former husband was living at the time of such last marriage, the court may take into consideration the fact that the former husband has not since that time been heard from; and in such case the dissolution of the former marriage by death or divorce before her second marriage will be presumed.

5. The general presumption is that life continues for seven years after an absent party is last heard from, and after the lapse of that time, death is presumed; but the presumption is not conclusive, and may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it.

6. DEATH—*presumption from long continued absence—evidence.* Mere rumor, however, that an absent party not heard from for several years, is dead or living, is not admissible in evidence, either to aid or rebut the presumption of his life or death at a particular time after he was last heard from.

7. Seven years must elapse before the presumption of death arises. After that length of time death is presumed; but there is no presumption that the life continued through the entire period, or that it was not extinguished at any particular time within it.

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Syllabus.

8. A jury may find the fact of the death of a party from the lapse of a much shorter period than seven years unheard from, when the circumstances of the case raise the presumption of death. The age, state of health and habits of the absent party, and many other circumstances, may be shown to aid or rebut the presumption of the continuance of life.

9. ABATEMENT—*plea of prior suit for the same cause—requisites of the plea, as to the pendency of such suit.* A plea to a bill for divorce, showing that prior to the filing of the same the complainant had exhibited her bill for a divorce in another court, alleging as cause therefor the same matters as in the latter bill, is bad on demurrer, if it fails to show that the former suit is still pending.

10. ALLEGATIONS AND DECREE—*as to matters in defence in chancery.* A defendant in a chancery suit is bound to apprise the complainant, by his answer, of the nature of the defence he intends to set up, and he can not avail himself of any matter in defence not stated in his answer, even though it may appear in the evidence.

11. CHANCERY—*striking from the files an amendment to answer in chancery—discretion.* In a suit by a wife for divorce, on the ground of desertion, upon which an issue of fact was submitted to a jury, the defendant, by leave of court, after the jury had retired, filed an amendment to his answer, setting up that the marriage was void for the reason that the complainant, at the time of her alleged marriage with him, had a husband then living, the court, after the verdict, on motion, ordered this amendment to be stricken from the files: *Held*, that the motion to strike the amendment from the files was addressed to the discretion of the court, and that the action of the court could not be the subject of review unless it was made to appear that the defendant was thereby deprived of some substantial right.

12. INSTRUCTION—*not applicable to any issue.* On bill by a wife for divorce, where the only issue by the pleadings was, whether the husband had deserted her for two years prior to the filing of the bill, the defendant asked the court to instruct the jury, that if they believed, from the evidence, that the complainant had a husband living at the time of her marriage with defendant, they should find for him, which the court refused: *Held*, properly refused, for the reason there was no such issue.

13. EVIDENCE—*proving the same fact twice.* On the trial of a suit for divorce, the complainant testified to the fact of a former marriage with another man who had not been heard from for six years before her marriage with the defendant, and it was *held*, no error to refuse in evidence the certificate of her former marriage to prove the same fact.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Cass county; the Hon. CYRUS EPLER, Judge, presiding.

Briefs of Counsel.

Mr. R. W. MILLS, for the plaintiff in error:

The circuit court of Cass county had no jurisdiction of the suit, for the reason that at the time it was commenced the circuit court of Menard county had acquired jurisdiction. Two courts can not have jurisdiction of the same cause at the same time. 1 Bouvier's Law Dic. p. 770, sec. 4.

A second marriage while the first subsists undissolved by death or divorce, is an absolute nullity. Bishop on Marriage and Divorce, secs. 201, 205; 1 Blackstone's Com. 436; 2 Kent's Com. 79.

The court erred in striking the amended answer from the files. Rev. Stat. chap. 110, sec. 24.

Whether our courts can annul a void marriage as the ecclesiastical courts do, is a question that does not arise here. The only question here is, can the court dissolve a void marriage.

Messrs. KETCHAM & GRIDLEY, for the defendant in error:

The wife was not a competent witness to prove her former marriage. 4 Bishop on Marriage and Divorce, sec. 327.

The presumption in favor of innocence and the legality of a marriage is such as to throw the burden of proving that complainant had a living, undivorced husband, upon the defendant. *Harris* v. *Harris*, 8 Bradw. 57; *Dijon* v. *People*, 18 Mich. 84; *Hull* v. *Rowls*, 27 Miss. 471; *Chapman* v. *Cooper*, 5 Rich. 452; *Candy* v. *George*, 6 id. 103; *Rex* v. *Twyning*, 2 B. & Al. 385.

The plea to the jurisdiction was bad. (*Garrick* v. *Chamberlain*, 97 Ill. 620.) But by answering over, defendant is estopped from raising the question of the sufficiency of the plea. Gould's Pleading, (4th ed.) p. 441, chap. 9, sec. 43.

The instruction as to a former marriage was properly refused, as there was no such issue presented.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was a bill for divorce, filed by Sarah C. Johnson, defendant in error, against Michael E. Johnson, plaintiff in error, in the Cass circuit court, where a decree of divorce was rendered. The cause was taken by writ of error, by defendant below, to the Appellate Court for the Third District. The decree of the lower court was there affirmed, and the present writ of error is prosecuted to this court from that order of affirmance.

The bill alleges, in the usual form, the residence of complainant, her marriage with defendant, and charges willful desertion by him for more than two years, etc. At the August term, 1884, of said circuit court, the defendant appeared and filed a plea, averring, in apt words, that before the filing of her bill in said court the complainant had exhibited her bill in the Menard circuit court against the defendant, for divorce, and alleging, as cause therefor, the same matters, etc., set up in her bill here filed, but failed to aver that such former proceeding was still pending. To this plea a demurrer was interposed, and sustained by the court, and this ruling is, among others, assigned for error. The demurrer was properly sustained. The plea, to have been sufficient, should have averred that the former cause was pending. *Garrick et al.* v. *Chamberlain et al.* 97 Ill. 620.

The defendant, by leave of the court, answered, denying the allegations of the bill. Replication being filed thereto, the cause was tried by a jury, resulting in a verdict for complainant. A motion by defendant for a new trial was overruled, and on a subsequent day of the term a decree of divorce entered. After the jury had retired to consider of their verdict, the defendant, by leave, filed an amendment to his answer, in which it was averred "that at the time of the pretended marriage of the complainant with the defendant, the complainant was a married woman, and was then and there the wife of one Albert

Thurber, who was then and there alive." After the return of the verdict this amendment was, on complainant's motion, stricken from the files, and this ruling is also assigned for error. This motion was addressed to the sound discretion of the court, the exercise of which will not be the subject of review unless it appears that some substantial right has been lost to the defendant, or some legal or equitable defence denied him. In the view we take of this case, as will be seen hereafter, this amendment could have been of no avail to the defendant upon the case made by the evidence introduced or offered in the court below.

That the evidence is sufficient to warrant the verdict and decree in favor of complainant is not denied by counsel for defendant, if her marriage with the defendant was a valid marriage. The serious contention is, that at the time of the marriage of complainant with defendant she had a former husband living, and therefore her marriage with defendant was void,—that whatever her rights under a bill properly framed for that purpose might be, no relief could be granted under this bill. This position of counsel would be undeniable if the evidence warrants the assumption that complainant had a former husband, who was living at the second marriage, and from whom she had never been divorced. The only evidence contained in the record tending to establish that at the time of her marriage with defendant the complainant had a husband living, is that given by complainant on cross-examination by defendant's counsel. This evidence was, in substance, that complainant was married to one Albert Thurber in Menard county, Illinois, on the 26th day of July, 1866; that they lived together three months; that said Thurber then deserted her and went away; that about a year after the separation, and some time in 1867, she received a letter from him, and that from that time to the trial, in August, 1884, she had not seen him or heard from him; that she had heard rumors at one time that he was dead, and another that

he was alive, and another that he was married again. No other witness testified in regard to the matter under consideration, or to any circumstance having any bearing thereon, and no other evidence was offered.

The marriage of complainant with the defendant is shown to have been solemnized in the month of February, 1874,—over six, but less than seven, years after the last knowledge of the former husband,—and it is contended, that as the law presumes the continuance of life where the time of the absence has not extended to seven years, this presumption must control, and therefore the marriage in issue is void. It has been repeatedly held that mere rumor that the absent party is dead or living can not be received in evidence, either to aid or rebut the presumption of life. The case of the defendant, as made by his amendment to his answer, therefore rests solely upon this supposed presumption of the living of the former husband at the time of the last marriage. The general presumption is, that life continues for seven years after the party is last heard from, and after the lapse of that time death is presumed; but the presumption is not conclusive,—is *presumptio juris* only,—and may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. Under the rule, seven years must elapse before the presumption of death arises. When the seven years have elapsed, the fact of death is presumed; but there is no presumption that the life continued through the entire period, or that it was or was not extinguished at any particular time within it,—that is, the law raises no presumption as to the time when, within the seven years, the death in fact occurred. (1 Greenleaf on Evidence, sec. 41; Bishop on Marriage and Divorce, secs. 452-456.) It is also clear that the jury may find the fact of death from the lapse of a much shorter period than seven years, when the circumstances of the particular case raise the presumption of death. 1 Greenleaf on Evidence, *supra.*

But if the law raises the presumption that the former husband was alive at the date of the last marriage, from the fact that seven years had not then elapsed since the last knowledge of him, it also, in the absence of proof to the contrary, presumes that the parties in contracting such marriage, and in subsequently cohabiting, were innocent of immorality or crime, and that there was no legal impediment to its consummation. When a marriage is shown, in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid. (Bishop on Marriage and Divorce, secs. 457, 458.) Presumptions of this class are not conclusive, but are sufficient, in general, to shift the burden of proof. (1 Greenleaf on Evidence, secs. 33-35.) These presumptions of innocence, and of the validity of the marriage, conflict with the presumption of life, and if neither presumption is aided by proof of facts or circumstances coöperating with it, the presumption of the validity of the marriage has generally been held to be the stronger, and to prevail over the presumption of the continuance of the particular life,—and this is so held although the time elapsing between the last knowledge of the former husband and the second marriage is much less than seven years.

Rex v. *Twyning*, 2 B. & Al. 386, was a case where these conflicting presumptions came under consideration. The wife of a soldier who went abroad, married again in a little over a year, and the question was as to the legitimacy of the children of this second marriage. The court said: "The law presumes the continuance of life for seven years, but it also presumes against the commission of crime. It is contended that the death of the husband ought to have been proved, but the answer is, that the presumption of law is that he was not alive, when the consequence of his being so is that another person has committed a crime."

In *Yates* v. *Houston*, 3 Texas, 449, four years only had elapsed after the disappearance of the wife before the husband and another woman appeared as husband and wife, under circumstances raising the presumption of marriage, and in considering the subject of the conflicting presumptions, the court held that "the rational presumption, after this lapse of time, is, that the former wife is dead. The ordinary presumption of the continuance of human life should not, under the facts in this case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their contracting the matrimonial relation."

In *Dixon* v. *The People*, 18 Mich. 84, the prosecution, desiring to use a witness who claimed to be the wife of the defendant, produced evidence of her marriage to one Phillips in 1859. Thereupon she was put on the stand, and admitted her marriage with Phillips, and stated that she last heard from him in April, 1860, and supposing he was dead, married the defendant in 1865. The court below permitted her to testify, against the objection of the defendant. The Supreme Court of that State, in reviewing the case, said: "The presumption of innocence,—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive,—rendered it obligatory on the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of her marriage with defendant."

In *Senser et al.* v. *Bower et al.* 1 Pa. 450, the court, in determining the validity of a second marriage, say: "But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the proof being equal, the presumption is in favor of innocence. And so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail."

In *Hull* v. *Rawls*, 27 Miss. 471, the widow of Rawls petitioned for dower, which was resisted upon the ground that her marriage with Rawls was void, for the reason that he had a wife living at the date of his marriage with the petitioner. The proof showed that petitioner and Rawls were married December 6, 1848, and that in 1844 Rawls was living with another woman whom he recognized as his wife. The court said: "The fact that the deceased (Rawls) was living in 1844 with a woman believed to be his wife, is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity."

The case of *Chapman* v. *Cooper*, 5 Rich. 452, was where five or six years only had intervened between the time the former husband was last heard from and the second marriage of the wife, and the court held that under the facts of that case (the case having been brought many years afterwards,) the presumption of innocence ought to prevail.

The only case of this character determined in this State, that we are aware of, came before the Appellate Court for the Second District for consideration,—*Harris* v. *Harris*, 8 Bradw. 57. That was a bill for divorce, filed by the husband against the wife, seeking to declare the marriage void because the wife had a former husband living at the time of the marriage of these parties. That court, in an able opinion by PILLSBURY, J., after reviewing many of the authorities here cited, said: "In cases like this at bar, where nine years had elapsed (at the trial) from the time the first husband was last heard from or seen by any witness testifying in the cause, the law will not presume the continuance of life to the time of the second marriage, but will require the complainant to introduce direct evidence to prove that the former husband was alive at the date of the second marriage. There being no sufficient evidence of this character to sustain the verdict, and as the instructions permitted the jury to find Lowry

(the former husband) was living at the time of the marriage between these parties, from the presumption of life, alone, thereby changing the burden of proof from complainant to the defendant, the case will be reversed."

Further citation of authorities will be unnecessary, as those cited sufficiently show the trend of judicial determination on this subject. It will be seen that many of the cases, like *Rex* v. *Twyning*, *supra*, seem to lay down the proposition as a strict rule of law, and hold that the presumption of innocence will prevail whenever the presumption of the continuance of life would impute crime. This appears to be the chief ground for criticism of the case last named, in *Rex* v. *Harborne*, 2 A. & El. 540. We think, however, that the weight of authority is, that it is a question of fact to be determined upon the circumstances of the particular case,—that there is no rigid presumption to be inflexibly followed, aside from the considerations of such circumstances. In *Rex* v. *Harborne*, *supra*, the circumstances being that the wife had been seen within twenty-five days of the second marriage of the husband, it was held that the presumption of the continuance of life should prevail, while in *Greenborough* v. *Underhill*, 12 Vt. 604, (afterwards questioned in *Northfield* v. *Plymouth*, 20 id. 582,) it was held that after an absence of two years not heard from, the presumption of innocence would prevail over the presumption of life. So, also, the age, condition of health, habits of the absent party, and many other circumstances, may be brought in to aid or rebut the presumption of the continuance of life. Therefore, no absolute rule can be laid down to determine when or in what particular case the presumption of life should prevail over the presumption of innocence, or the reverse; but the question, like any other question of fact, must be determined upon consideration of the attending facts and circumstances. It may, however, be safely said, that where there are no circumstances to aid the presumption of the continuance of life, the presumption of

innocence and of the validity of the second marriage should, in general, prevail.

It is always material to consider, in cases like the one at bar, not only the time that intervened between the last knowledge of the former husband or wife and the second marriage, but also between such last knowledge and the trial of the cause; for if the full period in which death is presumed, has elapsed at the time of the litigation, and there is no presumption as to when, within the seven years, the death, in fact, occurred, it may as well be held to have taken place before as after the second marriage, and there will, in that event, be "no great need of help from the presumption of innocence to sustain the second marriage." (Bishop on Marriage and Divorce, sec. 456; *Kelly* v. *Drew*, 12 Allen, 107.) In the case last cited, a woman had married four years after her former husband was last heard from. Sixteen years afterwards the validity of her second marriage was called in question. The court held it valid, and said: "No evidence was offered that the first husband had been heard from for twenty years, or that he had not died, or been divorced from her before her second marriage. Under the circumstances the presumption of the wife's innocence in marrying again might well overcome any presumption that a man, not heard from for four years before the marriage, or for sixteen years afterward, was alive, and her lawful husband, when she married the second time." At the trial of this cause over sixteen years had elapsed since the last knowledge of the former husband, and we see no reason why these principles do not apply. We think the complainant might safely rely upon the presumption of the validity of her marriage. The law did not impose on her, under the circumstances of this case, the duty of preserving the evidence of the dissolution of her former marriage, and producing it on the trial, but the burden was on the defendant to prove such facts and circumstances as would establish the invalidity of his marriage with complainant.

It is urged that the circuit court erred in refusing an instruction asked by the defendant, to the effect that if the jury believed, from the evidence, that the complainant had a husband living at the time of her marriage with defendant, then they should find for the defendant. The bill and answer presented no issue at that time to which the instruction was applicable, and it was properly refused. The rule in chancery is stated to be, "that a defendant is bound to apprise the complainant, by his answer, of the nature of the case he intends to set up, and that a defendant can not avail himself of any matter in defence which is not stated in his answer, even though it should appear in the evidence." (1 Daniell's Chancery Practice, 726.) The defendant could not, by an amendment after trial, make the refusal of an instruction error, which was not so at the time of its refusal.

It is also insisted that the court erred in giving an instruction for complainant. We have carefully examined the instructions, and under the issues as presented by the bill and answer, at the time of the trial, find no error. Holding, as we do, that the case was determined correctly on the merits, there is, in our opinion, no error in giving or refusing instructions for which the decree should be disturbed.

There was no error in rejecting the certificate of marriage offered by defendant. All it tended to prove had already been admitted in the presence of the court and jury by complainant, and if it had been competent evidence, the defendant could not have been prejudiced by its rejection.

Finding no error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus. Brief for the Plaintiff in Error.

EDMUND S. HOLBROOK, Devisee, etc.

v.

MARY M. GOUVENEUR, Devisee, etc.

Filed at Ottawa November 14, 1885.

1. LIMITATION—*under act of 1839, as to vacant and unoccupied land—entry under color of title—evidence—presumption.* Where a defendant in ejectment shows the payment of all taxes on the land, under color of title, for seven consecutive years while the land was vacant and unoccupied, and he is found or shown to be in possession when the action was brought, it will be presumed that his possession was under his color of title, especially when that fact was not disputed on the trial.

2. And where a party, as a condition to his being let in as a defendant in an action of ejectment brought in 1866, was required to admit by his plea that he was in possession of the premises when the suit was brought, and it was admitted that the land was vacant until the year 1862, when the plaintiff, without objection, read in evidence the return on the declaration, which showed that the defendant, another party, was then in possession, and judgment was for the defendant, it was *held*, that the judgment should not be reversed on the ground of the slightness of the evidence showing the defendant's actual possession under color of title before suit brought.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. FRANCIS GOODSPEED, Judge, presiding.

Mr. EDMUND S. HOLBROOK, *pro se:*

To make a defence under the ninth section of the Conveyance act of 1845, the defendant is required to establish three points: First, color of title; second, payment of taxes for seven years as to vacant lands by him, having color of title; and third, a reduction to actual possession of such vacant land. There is no proof as to the time defendant took possession, or that he came into possession under the color of title shown by him.

This suit was brought on February 24, 1866, against Peter Rickey, who, on February 14, 1871, withdrew his plea of not guilty, on the ground that he was not interested in the de-

fence, being a tenant of one Joseph I. Burton, who had notice of the suit, and refused to appear and defend. On the 15th of February, 1871, leave was given to Gouveneur to enter his name and appearance, and to defend as to the west half of the quarter section; but the court required him in his plea to admit possession of the premises at the time of the commencement of the suit. This admission so made, and for such a purpose, can not be construed as an acceptance of the truth of the plea by the plaintiff as a fact in evidence.

The rule that a pleading is to be construed most strongly against the pleader, should apply here. The court below construed it in his favor as an admission of the plaintiff. If Gouveneur took possession of Rickey, he would have acquired and held it, the same as Rickey, as tenant of Burton,—one not having color of title. It was held in *Dewley* v. *Van Court*, 21 Ill. 462, that the color-of-title man could not appropriate to himself a payment of taxes made by a stranger. It would be equally unreasonable that he should appropriate to himself a possession had by a stranger.

Messrs. GILBERT & ECKELS, for the defendant in error:

Under the general issue in ejectment, the plaintiff must prove, first, that he had the legal title in the premises at the time of the demise laid in the declaration; second, that he also had the right of entry; and third, that the defendant, or those claiming under him, were in possession of the premises when the suit was brought. 2 Greenleaf on Evidence, sec. 304.

From this it is apparent the plaintiff could not recover without proving possession in the defendant at the time of the commencement of the suit, and consequently could not be in a position to urge the want of proof of that fact as a ground for a reversal. On the other hand, the failure to make that proof entitled the defendant to a judgment. This rule is not changed by our statute.

On the question of limitation by seven years' payment of taxes on vacant land under color of title, see *Newland* v. *Marsh*, 19 Ill. 380; *Harding* v. *Butts*, 18 id. 506; *Robb* v. *Bowen*, 9 Pa. 71; *Paullin* v. *Hale*, 40 Ill. 177; *Hinchman* v. *Whetstone*, 23 id. 190; *Hale* v. *Gladfelter*, 52 id. 93; *Hardin* v. *Crate*, 60 id. 217.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by Seth W. Hardin, in the circuit court of Will county, against Peter Rickey, to recover the south-east quarter of section 19, town 33 north, range 10, east of the third principal meridian. A copy of the declaration was served on the defendant on the 19th day of February, 1866. The declaration was filed in court on the 24th of the same month, and on the 27th a rule was entered requiring the defendant to plead. On the back of the declaration will be found an affidavit of service, which contained the following: "He gave a copy of the within declaration and notice to the within named defendant, who was then in the actual occupation of the premises within described." To the declaration the defendant interposed two pleas: First, the general issue; and second, that he was not, when the action was commenced, in the possession of the west half of said quarter section of land in the declaration described. On the 14th day of February, 1871, the respective parties appeared in court by their attorneys, and defendant, Rickey, asked leave to withdraw his plea, on the ground that he was not interested in the defence, and the attorney for the defendant asked leave of court to enter the name of Samuel M. W. Gouveneur in the place of Rickey, and to defend as to the west half of the tract of land described in the declaration. The court, on the application, made the following order: "It is ordered by the court that the said Rickey have leave to withdraw his said plea, which is done; and that the said Gouveneur have leave

to enter his name and appearance, and to defend as to the said west half," etc. A default was then taken against Rickey as to the east half of the quarter section in litigation, and the substituted defendant filed a plea of the general issue, in which he admitted possession of the premises at the time of the commencement of the suit. After the filing of this plea, and on the 27th day of February, 1871, a jury having been waived, a trial was had before the court, which resulted in a judgment in favor of the defendant. The plaintiff appealed to this court, where the judgment was reversed, and the cause remanded. (*Hardin* v. *Gouveneur*, 69 Ill. 140.) After the remanding order had been filed, a second trial was had on the 10th day of June, 1878, before the court, without a jury, which also resulted in a judgment in favor of the defendant, to reverse which the plaintiff sued out this writ of error.

On the trial before the court the plaintiff read in evidence deeds which established a *prima facie* title in himself, and the defendant established color of title and seven successive years' payment of taxes while the land was vacant and unoccupied. But it is contended by plaintiff in error that the evidence before the court was not sufficient to establish possession by defendant under color of title and payment of taxes, and for the want of such proof he claims that the judgment was erroneous. The sufficiency of the evidence to establish possession of the land under the color of title read in evidence is the only question presented by the record.

We have given the question involved that consideration which its importance demands, and while there is much force in the argument of counsel for plaintiff in error, yet we are of opinion that under all the facts before the circuit court the judgment was correct. It will be remembered that the action was brought against the defendant, Rickey, who was alleged in the declaration to be in possession of the land. The return, under oath, of the person intrusted with the service of the declaration, shows, also, that Rickey was in the actual occu-

pation of the land when service was had upon him. These facts appearing in and upon the plaintiff's pleading, may be regarded as admissions by him, which may be availed of by the defendant. It is true that the name of the original defendant, Rickey, had been dismissed out of the case, and Gouveneur had been substituted as a defendant; but this change in the parties could not affect the question here involved. After the substitution of Gouveneur for Rickey, the action then stood precisely as it would if it had in the first instance been brought against him. He had the same rights and incurred the same liabilities as he would if the action had originally been brought against him.

But in addition to the facts alluded to, there is another admission which is entitled to much weight in the determination of the question. On the trial before the court, after the defendant had established payment of taxes from the year 1851 to the year 1861, both inclusive, by the production of tax receipts, the bill of exceptions shows that "the plaintiff, at the request of defendant, admitted that the land was vacant and unoccupied until the year 1862." After this admission the plaintiff then read in evidence the return on the declaration, which showed that the defendant, when the action was brought, was in the actual occupation of the land in controversy. Whether this return would have been regarded as legitimate evidence if it had been offered by the defendant, need not now be determined. It was offered and read by the plaintiff without objection from any quarter, and he is estopped from claiming that the testimony is not competent. If, then, the land was vacant, as is conceded, until the year 1862, and the defendant, who held color of title and paid all taxes for a period of seven years while it was vacant, was afterwards, when the action was brought, found in the possession of the land, it will be presumed that he was in possession under the color of title.

It does not appear that the question here raised was one in dispute or controversy before the circuit court. If it had been, doubtless more proof on the subject would have been introduced. Indeed, the defendant admitted, by his plea, that he was in possession of the land when the action was brought. There was, therefore, no necessity for the plaintiff to prove a fact which was admitted by the pleadings, and the defendant doubtless relied upon the pleadings, and implied understanding that he was in possession, and hence called no proof. But however that may be, we think there was evidence enough before the court to sustain the judgment, and it will be affirmed.

Judgment affirmed.

STEPHEN J. WILLIAMS *et al.*

v.

114 628
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GEORGE W. POTTER *et al.*

Filed at Ottawa November 14, 1885.

1. ELECTIONS—*town elections—restriction as to number of precincts in a town.* While under the general Election law, for other purposes, there may be several *precincts* in a township, yet for the purpose of a town election, merely, there can be but one precinct, which is co-extensive with the boundary of the town.

2. SAME—*of several polling places for town purposes.* While for annual town elections the whole town constitutes but one precinct, yet under certain circumstances there may be several polls or voting places where votes may be lawfully received in the same town. But they must all be regarded as constituting one precinct, and each polling place is open to all voters of the town alike, subject, only, to the limitation that no one shall vote at more than one place.

3. SAME—*by whom the polling places may be established—prerequisites to the establishing of more than one in the same town—as to designating the places.* The township authorities have no power to establish their polling places where more than one is required. That can only be done by the county board, and it can not establish more than one, except where it appears from

the last preceding general election the number of voters in the township exceeded three hundred, and their order creating an additional polling place must designate the place where it is to be held.

4. In this case a petition was presented to the county board, setting forth that there was but one election precinct in a town, and that a large number of the voters of the town resided and worked south and east of a certain river, who were not able to bear the expense of transportation across the river to the then existing precinct, and that the public interest required there should be two precincts in the town, and prayed for a new one to be established for all voters south and east of the river. This petition was referred to a committee, who reported recommending that the prayer thereof be granted, and the report, on motion, was adopted. No place for holding the polls was designated and no further action taken, and it did not appear that over three hundred votes had been cast in the town at the preceding general election. The town clerk, in giving notice of the succeeding annual town election, named a school house in district No. 9, as the place for holding the election in the territory south and east of the river: *Held*, that the school house named was not designated by the county board as a polling place, and that votes cast at such place could not be counted, they being cast at a place unauthorized by law.

5. SAME—*establishing a new precinct—whether the precinct thereby becomes a town polling place.* The county board has ample authority to make additional precincts in a town, for general election purposes, whenever it thinks the public convenience so demands, without regard to the number of the voters in the town. But the establishment of such new precinct will not make it an additional poll for receiving votes at town meetings unless the county board shall so designate it, and fix the place at which the polls shall be held.

6. SAME—*canvassing votes—as to town elections, and elections under the general Election law.* In the canvassing and returning of votes under the general Election law, each precinct is wholly independent of the others, and makes its own returns directly to the county clerk, while, in the case of mere polling places for town elections, after the close of the polls, the ballot boxes of the subordinate polls are taken to the chief polling place, where the town clerk officiates, and they are all then opened and canvassed, the same as if the ballots had all been deposited in one box.

APPEAL from the County Court of Will county; the Hon. HIRAM T. GILBERT, Judge, presiding.

Messrs. OLIN & PHELPS, and Messrs. HALEY & O'DONNELL, for the appellants.

Mr. C. W. BROWN, and Mr. A. F. MATHER, for the appellees.

Mr. CHIEF JUSTICE MULKEY delivered the opinion of the Court:

At the spring election held in the township of DuPage, Will county, on the 7th day of April, 1885, the appellants, Stephen G. Williams, Christian Flugga and John Burkhardt, were, respectively, candidates for the offices of supervisor, collector and justice of the peace of said township, and the appellees, George W. Potter, Seymour Buel and Albert M. Armstrong, were, respectively, opposing candidates for said offices. Upon a canvass of the votes the appellants were all declared elected. The appellees thereupon filed their several petitions in the county court to contest the election of appellants. As the same questions were involved in all the cases, by consent of parties they were consolidated, and tried as one case. Upon the hearing the county court found such irregularities had occurred in calling and conducting the election, as to vitiate it altogether, and entered a decree accordingly. This appeal is prosecuted by the defendants in the petition to reverse that order.

The rights of the successful candidates, as declared by the canvassing board, are assailed on a number of grounds, two of which, only, are necessary to be considered, as they fully cover the frictional points in the case. It is claimed, first, that the votes cast at district No. 9, one of the polling places at said election, are void for the reason there was no authority for holding an election at that place; secondly, that the officers conducting the election were guilty of such improper conduct and irregularities, particularly after the closing of the polls, as to render the election void.

It appears that prior to the 15th of September, 1884, the only polling place in the town was at the Sprague school house, in school district No. 4. On that day the following petition, signed by one hundred voters, was presented to the board of supervisors:

"The undersigned, citizens, property owners and tax-payers of the town of DuPage, in said Will county, show unto your honorable body that there is but one election precinct in said town; that a large number of the voters of said township reside and work south and south-east of the Des Plaines river as laborers in the stone quarries in that location, who are not able to bear the expense of transportation across the river to the present precinct; that we believe that the interests of the voting population of said town require that there should be two election precincts in said town, and that a new election precinct should be established for all voters of said township south and east of the Des Plaines river. We therefore pray your honorable body to establish a new and second election precinct for said town, to embrace all the voters south and east of the Des Plaines river. Elections to be held at the school house of school district No. 9."

The petition was referred to a committee, who, on the 17th, made a report recommending that the prayer thereof be granted. It was thereupon moved by one of the members of the board that the report be adopted, which motion, upon a vote being taken, was declared passed. No further action was ever taken by the board in respect to the petition, but the record shows that the town clerk, on the 26th day of March, 1885, published the following notice:

"*Annual Town Meeting.*—Notice is hereby given to the citizens, legal voters of the town of DuPage, residing south and east of the Des Plaines river, in the county of Will, and State of Illinois, that the annual town meeting of said town will be held at the school house, district No. 9, in said town, on Tuesday, April 7th, 1885, being the first Tuesday in said month, for the purposes following, viz:"

Then follows a specification of the objects of the meeting, and the signature of the clerk, in his official character. If the votes cast at the polling place specified in this notice are

to be counted, the appellants received a majority of the legal votes cast.

Paragraph 51, chapter 139, of the Revised Statutes, fixes the time of holding the annual town meetings for the election of officers, etc., on the second Tuesday of April in each year, *at the places appointed* for such meetings. Paragraph 52 provides for notice of town meetings, and specifies the kind of notice, the manner of giving it, and the person or persons by whom it is to be given. Paragraph 53 provides that for the purposes of town meetings each town shall constitute an election precinct. Paragraph 54 declares that "the place of holding elections shall be some convenient place in the town, *to be fixed by the electors* at their annual town meetings." Paragraph 55 provides for the manner of changing the place of holding town meetings, which can only be done on petition, and by a majority vote at a town meeting, after due notice of such contemplated change and of the time of voting thereon. Paragraph 56 makes the supervisor, assessor and collector *ex officio* judges of elections in their town, except as otherwise provided by law. Paragraph 61 provides for the election of town officers at the annual town meeting. Paragraph 62 points out the time and manner of organizing such meetings. Paragraph 67 provides as follows: "The town shall supply a suitable ballot box or boxes, to be kept and used in like manner as ballot boxes in other elections. In * * * any organized town where the number of votes at the last preceding general election exceeded three hundred, the county board may require one or more additional ballot boxes and places for the reception of votes to be provided, which places *shall be selected* with reference to the convenience of the electors of the town, and *shall* designate at which of said polling places the town clerk shall act as clerk of the election; and such polling place, when so designated, shall be the place of transacting the miscellaneous business of the town; and when several places are so provided, the electors present shall

choose from their number, one assistant moderator and one assistant clerk for each additional ballot box, to receive the votes therein, who shall take the same oath and be subject to the same penalties as the moderator and clerk, and shall be under the direction of the moderator. At the closing of the polls, all the said ballot boxes shall be brought together at the polling place where the town clerk acts as clerk of the election, and the votes shall be canvassed at the same time and in the same manner, and return thereof made the same, as if all the votes had been cast in the same box; * * * and it shall be the duty of the town clerk, or if there be no town clerk it shall be the duty of the county clerk, to post up in three of the most public places in the town, a notice of each of the places in the town *where the county board* have directed and required the election to be held."

The foregoing provisions, it is believed, are all that have any special bearing on this case. They apply to town elections exclusively, and this fact must be kept constantly in view in the consideration of this case. Elections for other purposes, such as for State and county officers, are governed by the general Election law applicable to counties under township organization, which consists of different and independent statutory provisions, and the whole difficulty in this case has evidently arisen from confounding the two systems pertaining to elections in counties under township organization.

The record conclusively shows there was but one legal voting place in the township for town officers, and that was at Sprague school house, district No. 4. While, under the general Election law, for other purposes there may be several *precincts* in a township, yet for the purposes of a town election, merely, there is but one precinct,—or, in other words, but one territorial boundary limiting the right to vote, and that is co-extensive with the township itself. While this is so, there may, under certain circumstances, be several polls or places where votes may be lawfully received, in the same

township, but they are all to be regarded as in the same precinct. They are established for the convenience of the voters, and each polling place is open to all the voters alike, subject to the limitation, of course, that no one is permitted to vote at more than one place at the same election. The town authorities, however, have no power to establish these polling places. That can only be done by the county board, and it can not establish more than one, except where it appears, from the last preceding general election, the number of votes in the township exceeded three hundred. This clearly appears from paragraph 67, above cited. The record in this case, however, affirmatively shows there was not the requisite number of votes in the township to warrant the establishing of more than one place for receiving votes at such town election. But suppose we might say that whether such number existed or not was a *quasi* judicial question, the determination of which, under the statute, devolved upon the county board, and that that tribunal having decided it, we must accept its decision as conclusive,—without expressing any opinion upon the soundness of this proposition, the question then arises, did the county board designate the school house in district No. 9 as an additional poll or place to receive votes. The only ground for such a claim is the petition above set forth, the report of the committee approving it, and a vote by the board approving the report of the committee and accepting the same. But suppose we could say this was equivalent to ordering what the petitioners had asked, which, to say the least of it, is by no means free from doubt, did such order establish an additional polling place for township purposes? If so, it certainly accomplished something the petitioners had not asked to be done. What the petitioners asked was the establishment of a *new election precinct*. But that is quite a different thing, and is something with which the township had nothing to do. The establishment of new or additional precincts is provided for under the general Election law. (See paragraph 32

of chapter 46.) The county board has ample authority to make such additional precincts for general election purposes whenever it thinks the convenience of the voters requires it, without regard to their number, and the establishment of such a precinct would not make it an additional poll for receiving votes at town meetings unless the county board should so designate it. As to polling places for town purposes, merely, the town itself selects where there is but one, and if additional ones are required, the county board *designates* the places and the town *provides* them, together with the additional ballot boxes, in conformity with paragraph 67, chapter 139, above cited. But as to providing voting places or additional ballot boxes in the new precincts, the town has nothing to do with it. Moreover, the mode of conducting the election, canvassing and making returns thereof, at a mere polling place for township purposes, is altogether unlike that which the law requires for a precinct election. In the latter case each precinct is wholly independent of all the others, and makes its own returns directly to the clerk of the county court. In the case of mere polling places, as soon as the polls are closed the ballot boxes of the subordinate polls are taken to the chief polling place where the town clerk officiates, and they are all there opened and canvassed just as if they had all been deposited in one box, and the result declared and recorded in the presence of the assembled voters.

It is clear, then, beyond all question, that the school house in district No. 9 was never designated or appointed by the county board as a polling place for township purposes, and it is a conceded fact there was not a sufficient number of voters in the township to warrant such appointment by the county board. The case made by the record, then, is simply this: A number of voters of the township assemble at a place unauthorized by law, organize, and hold an election for town officers,—and the question is, shall the votes cast at such election be counted. The question is too plain to admit of

serious argument. It is clear, upon the plainest principles of law, they can not be so counted. The whole thing, however well intended, was, in contemplation of law, illegal and void,—indeed, a mere farce,—and we agree with the trial court in holding that it was such a grave departure from the requirements of the law as to vitiate the election altogether.

The judgment will be affirmed.

Judgment affirmed.

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BARBARA A. GREEN

v.

GEORGE V. DIETRICH.

Filed at Ottawa November 14, 1885.

1. VENDOR AND PURCHASER—*right of the latter to buy in outstanding superior title.* The purchaser of land, while in possession under his contract of purchase, is under no obligation to maintain his vendor's title, and the law does not forbid him from buying an outstanding title to the premises, and asserting it against his vendor.

2. So where the purchaser entered into possession under an agreement that the purchase money was not to be paid unless the vendor should, within three years, make him a warranty deed conveying a perfect title, and in case of failure to make him such conveyance the purchaser was to remain in possession of the premises for the period of three years, and pay a reasonable rent for the time he could hold peaceable possession, and before the expiration of the three years he acquired the title from other parties, it was *held*, that there was nothing in the relation of the parties, under the original contract or otherwise, that prevented the purchaser from yielding to the superior title and purchasing the same, and in that way secure his peace.

3. LANDLORD AND TENANT—*whether the relation exists—as between vendor and purchaser.* In such case the relation of landlord and tenant did not exist between the parties after the expiration of the three years. The purchaser was not bound to pay rent after that time, he having in the meantime acquired title to the premises from another source independent of his vendor, and the "reasonable rent" the purchaser was to pay on failure of his vendor to make a deed, was intended as compensation for the use of the land for such period as he might peaceably hold possession during the three years.

Brief for the Appellant.

4. TRUST—*sufficiency of evidence to show land was bought for another.* Where a person, after taking possession of land under a contract of purchase, by which he is not required to pay the contract price unless his vendor shall acquire the title to the same within three years, purchases from others the superior title, under which he claims the property as his own, in order to show that his subsequent purchase of the title was for his original vendor under a verbal contract to that effect, it is incumbent on the party claiming the trust to establish the existence of such verbal contract by a clear preponderance of evidence.

5. So after the lapse of many years, and after the death of the party so purchasing, the testimony to establish a verbal contract that the purchase was made for another, should be of the most satisfactory character, and evidence of the admissions and statements of the party, in casual conversations, shown after his death, are too unreliable to justify a decree divesting the title of his heirs long after his death.

6. LACHES—*as against a claim of a trust in land.* Where a person purchased in the outstanding titles to land in his own name, presumably for his own use, and for several years after and until his death held the land under such title as his own, and his widow and heir held the same for thirteen years after his death, and expended considerable sums in improvements upon the property before bill was filed by another claiming that the purchase was made for his benefit, it was *held*, that the *laches* was such as to prevent equitable relief.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLOUGHBY & DOUGHERTY, for the appellant:

This was a contract for the payment, by Alfred Thurman, of $3500 three years from its date, November 2, 1864, provided S. B. Allen should, within that time, make a deed to Thurman conveying a perfect title to the land in controversy. This he could not do, for the reason that at no time during the three years did he have even color of title.

It is claimed that Thurman bought the titles for the benefit of S. B. Allen, he to be credited on the purchase price of whatever they cost him. To this we reply, that such agreement is not shown by the proofs, and if made, was void, as being an agreement in parol concerning an interest in land. *Sheldon* v. *Harding*, 44 Ill. 73.

Thurman and those claiming under him have been in the possession of this land since August 17, 1865, claiming adversely to S. B. Allen. If Thurman was a tenant, at the close of the tenancy he could disclaim and set up adverse title in himself. *McGuffie* v. *Carter*, 42 Mich. 499; *Page* v. *Kinsman*, 43 N. H. 328; *Despard* v. *Walbridge*, 15 N. Y. 377; *Insurance Co.* v. *McKenzie*, 10 C. B. (N. S.) 1870; 1 Taylor on Landlord and Tenant, sec. 629; 1 Washburn on Real Prop. 369.

Thurman took possession as a purchaser and not as a tenant, and a purchaser in possession is not estopped to set up an adverse title. *Bright's Lessee* v. *Rochester*, 7 Wheat. 547; *Jackson* v. *Johnson*, 5 Cow. 74.

Whatever equities, if any, ever existed against the appellant, have been lost by gross *laches*. *Rose* v. *Swann*, 56 Ill. 40; *Wilson* v. *Walkins*, 3 Pet. 43.

Messrs. SANFORD & CARNEY, for the appellee:

The contract between the parties, dated November 2, 1864, was more than a contract of purchase. It provided that if Allen failed to make the title, Thurman owes Allen a reasonable rent. If Thurman was a tenant of Allen, the appellant, succeeding in the possession, was also a tenant. Angell on Limitations, sec. 442; *Hardin* v. *Forsythe*, 99 Ill. 312.

The titles which Thurman acquired under the sheriff's deed and the Boylin deed were acquired by him in the interest of Allen, and as a part compliance on the part of Thurman. He was to be credited on his contract for the same.

Owing to the relations of the parties the contract was not within the Statute of Frauds. *Moon* v. *Titman*, 44 Ill. 367; *O'Halloran* v. *Fitzgerald*, 71 id. 53.

Owing to the trust and relations of the parties, *laches* can not avail as a defence. *McNamara* v. *Garrity*, 106 Ill. 384; Angell on Limitations, secs. 437-447; *Lowe* v. *Emerson*, 48 Ill. 160; *Rigg* v. *Cook*, 4 Gilm. 351; *Zellar's Lessee* v. *Eckhart*, 4 How. 295; *Hancock* v. *Harper*, 86 Ill. 445.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

The bill in this case was brought by George V. Dietrich, in the circuit court of Knox county, against Florence Green and Barbara A. Green, and is to compel a specific performance of a contract made by and between Stephen B. Allen and Alfred Thurman, since deceased, for the sale to Thurman of the premises involved in this litigation. One of the defendants, Barbara A. Green, is the widow of Alfred Thurman, and the other, Florence Green, is his only child and heir-at-law. Whatever title Alfred Thurman had in the premises is now claimed by defendant Barbara A. Green. Complainant alleges that whatever title Stephen B. Allen had to the property in controversy has since been acquired by him through certain *mesne* conveyances, and he asks by his bill to have the written contract between Alfred Thurman and Stephen B. Allen, in regard to the land, performed by defendants in his favor, if they shall elect to do so, and on their failure to perform such contract, that certain titles which it is alleged Thurman acquired to the property, be declared to have been held by him in trust for Stephen B. Allen and his grantee, and that defendants be decreed to convey such titles as they have, by inheritance or otherwise, to complainant, and for other relief. On the hearing in the circuit court, it was decreed substantially according to the prayer of the bill, and defendant Barbara A. Green brings the case to this court, and assigns numerous errors on the record.

The agreement between Allen and Thurman, concerning the land, was entered into on the 2d day of November, 1864. It recited that Allen had sold to Thurman the land described in the bill, for $3500, to be paid within three years from the date of the contract, with interest at the rate of seven per cent per annum, but the purchase money was not to be paid until the vendor should make and deliver to the vendee or his legal representatives a good and sufficient warranty deed

therefor, with a perfect title to the premises. The agreement contained the following paragraph: "It is further agreed between the said parties hereto, that in case the said Stephen B. Allen or his legal representatives shall fail to make, execute and deliver unto the said Alfred Thurman or his legal representatives said deed of conveyance, as before stated, the said Thurman shall have full and continued possession of said premises until the expiration of three years, to pay all taxes which may be hereafter assessed on said premises; and in case of the failure aforesaid of the party of the first part to make said deed, the said Thurman is to pay the said Allen a reasonable rent for said premises so long as he can hold peaceable possession of the same." It may be necessary further on to give a construction to this clause of the contract. At the time this contract was made there is no pretence that Allen had any legal title to the land. All he had was possession, and that he delivered to Thurman. Nor is it claimed he was in a position, at any time within three years after the date of the contract, to make a perfect title of the land to Thurman. It is clearly proved that Stephen B. Allen did not then have any legal title to the land, nor has he since acquired such legal title. Whether he had any equitable title that he could convey to complainant, must depend on what conclusion shall be reached as to the titles subsequently acquired by Thurman from other sources,—that is, whether Thurman acquired such titles for himself in his own right, or as trustee for Allen and his grantee.

It seems Everett Messenger and William H. McWhirter were sureties for Stephen B. Allen in some matters, and in order to indemnify them, he made to them an equitable assignment of his contract with Alfred Thurman, concerning this tract of land. After the death of Everett Messenger, to make that assignment more effective he made a deed of the land to M. J. Messenger, the administrator of Everett Messenger, deceased. Since then, Frank S. Murphy bought of

M. J. Messenger whatever interest in the land he obtained by his deed from Allen, for the sum of $1000, and for his convenience had the deed made to complainant. In his deposition Stephen B. Allen distinctly states he derived title to this land from his brother, Elisha B. Allen, by a deed sent to him from Oregon, and that he never had any title to the land until he received that deed. All the title complainant has to the land in controversy is the title that was in Stephen B. Allen, which he derived from his brother, Elisha B. Allen. No other title is insisted upon.

Both parties seem to concede that prior to February 25, 1858, John Comstock owned the entire quarter section now in dispute. On that day he conveyed the undivided half of the quarter section to Benjamin F. Allen. Afterwards, on the 3d day of March, 1859, Benjamin F. Allen, his wife, Mary, not joining with him, conveyed this quarter section, with other lands, to his son, Elisha B. Allen. This deed was recorded April 14, 1862. Prior to that date,—that is, on the 15th day of October, 1859,—John Comstock had conveyed the other undivided one-half of the quarter section to Andrew Crawford. This latter deed was recorded August 16, 1861, which was before the recording of Benjamin F. Allen's deed to his son, Elisha B. Allen. In May, 1862, by virtue of an execution issued on a transcript judgment in favor of Owen Conlin, against Elisha B. Allen, the interest of defendant in execution, in the land, was levied upon and sold to the plaintiff in execution, for $318. There was no redemption from that sale by any one, and afterwards the sheriff made Alfred Thurman, as the assignee or holder of the certificate of purchase, a deed for the land that had been sold to Conlin. The title to the undivided half of the quarter section that was in Crawford, afterwards, through certain *mesne* conveyances, came to Alfred Thurman. That title he held at the time of his death. Since the death of Alfred Thurman, defendant, Barbara A. Green, purchased from the widow of Benjamin F. Allen, for

the sum of $1000, her dower in this quarter section, and in other lands claimed to have been owned by her late husband, and took a conveyance of the same to herself and her daughter, Florence Green. Subsequently to the making of this latter deed, Barbara A. Green and Florence agreed to a parol partition of the land, in which it was agreed Barbara A. Green should have the quarter section in controversy in this suit, and that Florence Green should have certain lands that had been conveyed to her by Alfred Thurman, and his wife, Barbara A. Green, and in consideration of that agreement Florence relinquished and gave to her mother all her interest and title to the land in dispute. That was in 1875, and since then Barbara A. Green has been in the exclusive possession, and Florence has claimed no interest in this particular parcel of land adverse to her mother, and does not now claim any.

From this statement of the evidence it is apparent the title that was in Comstock, who seems to have been the source of title claimed by both parties, was vested in Alfred Thurman, and since his death, by the parol partition of land made by the heir and the widow, the land in controversy is now the property of Barbara A. Green, unless it shall be held the titles acquired by Alfred Thurman in his lifetime were taken in his name in trust for complainant's remote grantor, Stephen B. Allen. That is really the only question of any moment in the case. Preliminary to the examination of that question it may be necessary to inquire what were the exact relations between Allen and Thurman,—whether they were that of vendor and vendee, or lessor and lessee.

It is assumed in the argument, the relation of lessor and lessee existed, and that as the defendant, Green, came into possession under her husband, she is still a tenant, and can not dispute the lessor's title without first surrendering possession of the premises to him or his grantee. The determination of this question involves a construction of that clause

of the contract between the parties before noticed. It can hardly be said the relation existing between them, during the three years the contract had to run, was other than that of vendor and vendee. Obviously no rent was to be paid during that period, and Thurman occupied the premises as purchaser, and not otherwise. It will be noted the titles bought in by Thurman were so bought during the period the relation of vendor and vendee existed. The vendee is under no obligation to maintain his vendor's title, and there is no policy of law that forbids the vendee in possession to buy in an outstanding title to the premises and assert it against his vendor, otherwise it might be asserted by the owner, or a stranger might buy it, and it would be lost to both. (*Bright's Lessee*, 7 Wheat. 535; *Jackson* v. *Johnson*, 5 Cow. 74.) But what was the relation that existed between the parties after the expiration of the three years in which the vendor had to perfect his title? Was it that of landlord and tenant? If so, how long was that relation to endure? If at all, it might be perpetual, and it seems most unreasonable that the parties in this case were contracting for such a lease. A demise of real property in perpetuity would seem to be equivalent to an absolute conveyance, and is perhaps so regarded in law. That clause of the contract which is said to create the relation of landlord and tenant, provides in case of the failure of Allen to make the deed as stipulated in the agreement, then Thurman was to pay him "a reasonable rent for said premises so long as he can hold peaceable possession of the same." Does this mean after the expiration of the three years allowed for the making of the deed? Surely not. After Thurman had purchased in the outstanding titles as he did, it does not appear, from anything in this record, there was any one who could contest his right of possession, and it might be perpetual in him, his heirs or grantees. If Thurman was, by this agreement, a tenant after the expiration of the three years, then, as before suggested, that might be equivalent to a perpetual

tenancy, for there was none that could dispossess him. Such a construction is unreasonable, and can not be adopted. Read in the light of the evidence and attendant circumstances, as should be done, all this clause of the contract means is, that in case of the failure of the vendor to make the vendee a deed such as his contract obligated him to make, within three years, then the purchaser bound himself to pay a compensation for the possession he enjoyed, denominated "reasonable rent," for such period as he could hold possession during that time. It will be observed nothing was to be paid until after the contract had expired by its own terms, or unless the vendee had been sooner dispossessed by a superior title. Before that could occur, all relations, whether of vendor or vendee, or otherwise, would have ceased. Strictly speaking, the relation of landlord and tenant never did exist, and never could exist, between Allen and Thurman under their written contract. So there is nothing in the relation of the parties, under the contract or otherwise, that would forbid Thurman to yield to a superior title and buy it in, and in that way secure his peace.

Recurring now to the principal question, whether Thurman bought in the outstanding titles to the property for himself, or under an agreement to buy them for Allen, it will be seen the testimony is as to a verbal contract, if any existed. The written contract contains nothing whatever in regard to buying any outstanding titles or removing incumbrances on the property, by Thurman or any one else. The testimony as to the existence of any contract on the part of Thurman, comes mostly from the witness Cooley. There is but little evidence in the record in support of his statements. Several witnesses gave casual conversations with Thurman concerning these matters, but no great importance ought to be attached to such evidence. It is too unreliable to be made the basis of a decree divesting the legal representatives of a party long since dead, of their title to the property. Had he lived he might have

given some explanation to the conversations or admissions given in evidence, or detailed other parts of the same conversations, that would have made his meaning better understood. Most important of all the testimony introduced on this branch of the case, is that given by the witness Cooley. It is to the effect that after the contract between Allen and Thurman had been executed, the parties came to his office, and it was verbally agreed witness was the agent of Allen to perfect the title by getting in any outstanding claim there might be against the property, and for the purpose of paying for the outstanding claims, Thurman was to furnish the money, and receive a credit as for so much money paid on the purchase price of the land. In pursuance of that arrangement, the witness says he conducted the negotiation which resulted in the purchase of the Crawford title, and which was conveyed to Thurman, for which he paid $700. It does not appear the witness had any connection whatever with the buying in of the Conlin title, which was purchased by Thurman and paid for by him, or that he did anything by way of securing a deed to Stephen B. Allen from Elisha B. Allen, then residing in Oregon. But Stephen B. Allen himself, in his deposition, states the only contract between himself and Thurman was the original or written one, and says distinctly, "Thurman did not agree to buy any title for me." He also testifies the witness Cooley told him "there were no claims worth paying attention to; that he spoke of the Comstock title, which he said wasn't worth anything." According to his testimony he was advised by Cooley the Comstock title was "no account," and he added, "Thurman and I never agreed to buy up that title." Treating these witnesses as of the highest respectability and as of equal credibility, it can not be said it proved the existence of even a verbal contract on the part of Thurman to buy in any outstanding titles for the benefit of Allen. In coming to a conclusion it ought to be regarded as a circumstance of great weight, that now that Thurman is dead his version of

what the witness said occurred between the parties can not be obtained. If living, he might corroborate Allen in saying he "didn't agree to buy any title" for him. That would be in harmony with his interest and his subsequent conduct, and it is not unreasonable to presume he would so testify. After the lapse of so many years, and since the death of the party most interested, the testimony to establish a verbal contract to the effect insisted upon, that would unsettle the title to property long after the death of the party in possession, and who claimed in his lifetime to be the absolute owner, ought to be of the most satisfactory character. Conflicting as the testimony is, it does not, satisfactorily at least, prove the existence of such a contract. It was incumbent on complainant to establish the existence of that contract by a clear preponderance of the evidence, and failing to do so, he can have no standing in a court of equity. If it shall be conceded, as must be done under the evidence, that Thurman bought in the Boylin and Conlin titles for himself, as he had a legal right to do, and not for Allen, under a contract to do so, then the title now held by Barbara A. Green seems to be the better title. At least no reason is perceived, either in law or equity, why defendant in possession should be required to surrender to complainant the title she has, whatever it may be, and if complainant is advised he had a better title, he should have tested it in a court of law, where legal titles are properly cognizable, and not in a court of chancery.

Without resting the decision on that ground, there is much force in the argument that Allen has been guilty of such *laches* as would bar any relief, either to him or to his grantees. The written contract between Allen and Thurman was made in 1864, and the latter did not die until 1870. This suit was not brought until 1883. Thurman was in possession of the premises six years before his death, and several years after he had bought in the outstanding titles in his own name, presumably with an intention to hold them adversely to Allen,

and if the latter intended to insist the titles so acquired by Thurman were for his benefit, he should have asserted that claim in the lifetime of Thurman, that he might have better defended than can now be done by his legal representatives. Since the death of Thurman the grantor of the parties now claiming adversely to him had been guilty of *laches* in not asserting claim, if they had any, against his legal representatives. Since then the party in possession, resting under the confident belief she was the owner, has been permitted to buy in the dower interest that incumbered the property, and to make permanent improvements thereon, and it would seem to be inequitable now to permit him or his grantees to assert a claim to the property she has improved by the outlay of her money, under the claim of ownership.

Under no view that can be taken is complainant entitled to relief, and the decree of the circuit court will be reversed as to Barbara A. Green, who is the only one of defendants that now claims any title to the land involved in this suit or who has assigned errors on this record, and as to her the bill will be dismissed.

Decree reversed.

ERNEST W. LADD

v.

WILLIAM PIGOTT.

Filed at Ottawa June 13, 1885.

1. FRAUD AND DECEIT—*false representations in respect to lands remote from place of making contract—how far a party may rely upon them.* Where a party effects an exchange of real estate situate in another State, with a person residing in this State, for property here, by means of false representations as to the quantity of his land, the location thereof, and the character of the improvements thereon, with a knowledge of the falsity of his representations, he will be liable to the injured party in an action on the case

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Statement of the case.

for fraud and deceit. Under circumstances like these, the person with whom the exchange is sought may rely upon the statements as being true, without being guilty of such negligence as to preclude a recovery by him for the fraud practiced on him. It might be different where the property is situated conveniently near, so as to permit an examination to be readily made.

2. AMENDMENTS AND JEOFAILS—*defect in pleading cured after verdict.* In an action for fraud and deceit in the exchange of land with the plaintiff for a leasehold interest in a building, and the goods therein, if the declaration fails to aver the assignment of the lease by the plaintiff, which was sold with the stock of goods, it will be too late to object to this defect in the pleading after trial and judgment.

3. PRACTICE—*time to object that evidence is not admissible under the pleadings.* If a declaration contains no averment to authorize the admission of evidence to prove a particular fact, objection should be specifically made to the introduction of such evidence at the time it is offered, so that the objection may be obviated by an amendment of the declaration. If not so made the objection will be deemed to have been waived.

4. SAME—*directing a nonsuit.* Where there is evidence tending to prove the averments of the declaration put in issue, a motion for a nonsuit will be properly refused.

5. INSTRUCTIONS—*whether assuming facts.* Where the propositions in an instruction are all made to rest upon what the jury shall believe from the evidence, or when it states a hypothetical case, which, if the jury believe, from the evidence, existed, they may consider, it will not be liable to the objection it assumes there is evidence of the fact, or indulges in presumptions that there is evidence to prove such propositions.

6. SAME—*whether to be construed as limiting the proof required.* In an action on the case for fraud and deceit in the exchange of property, the defendant asked the court to instruct the jury that the plaintiff was not entitled to recover unless they should find, from the evidence, that the defendant made the representations alleged in the declaration. The court gave the instruction, but added thereto, "or some material part thereof:" *Held*, that as modified it did not mean that the plaintiff might recover if he proved some of the material representations alleged, but that he must prove all that were material of such representations, which, strictly speaking, is the law.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. SIDNEY SMITH, Judge, presiding.

The declaration in this suit is in case, to which the general issue was pleaded. The action was brought by William Pigott, against Ernest W. Ladd, to recover for deceit and fraud prac-

ticed by defendant in the sale and exchange of property. On the trial in the Superior Court plaintiff recovered a judgment for $1250, against the defendant, which judgment was afterwards affirmed in the Appellate Court for the First District.

Mr. E. K. SMITH, for the appellant:

False representations as to the condition, situation and value of real estate are not actionable, unless purchaser has been fraudulently induced to forbear inquiry, and then the means must be stated in the declaration. *Brown* v. *Bledsoe*, 1 Idaho, 76; *Crown* v. *Carriger*, 66 Ala. 590.

The representations should be stated in substance, their falsity averred, and that they were made with intent to deceive the plaintiff, and induce him to make the trade or purchase in question, and that they did induce such trade. *Barber* v. *Morgan*, 51 Barb. 116.

In an action for deceit, a *scienter* is necessary to be alleged and proved. *Moore* v. *Noble*, 53 Barb. 425; 36 How. Pr. 385; *Homer* v. *Fellows*, 1 Doug. 51; *Terrell* v. *Bennett*, 18 Ga. 404; *Woothan* v. *Callahan*, 26 id. 366; 32 id. 382; *Hepper* v. *Lisk*, 1 Ind. 176; *Gaffing* v. *Newell*, 9 id. 572; *Holmes* v. *Clark*, 10 Iowa, 423; *Courtney* v. *Carr*, 11 id. 295; *Hallam* v. *Tidhunter*, 24 id. 166; *Pattygrew* v. *Chellis*, 41 N. H. 95; *Taylor* v. *Frost*, 49 Miss. 328; *Morton* v. *Scull*, 23 Ark. 289; *Young* v. *Scovell*, 8 Johns. 23.

The false representations must not only be calculated to deceive, but they must be made with intent to deceive. *Stafford* v. *Newsom*, 9 Ired. L. 507; *Munro* v. *Garidner*, 3 Brev. 31; *Gibbs* v. *Odell*, 2 Coldw. 132; *Breed* v. *Clark*, 55 Vt. 577.

The intent must be proven. *Micon* v. *Montgomery Bank*, 104 U. S. 530; *Lewiston Bank* v. *Dwelley*, 72 Me. 223; *North River Bank* v. *Schumann*, 63 How. Pr. 476.

In actions for fraudulent representations, which defendant is alleged to have known to be false, such knowledge is an essential ingredient, and must be proved. *Merwin* v. *Arbuckle*,

81 Ill. 502; *Bartholomew* v. *Fort*, 4 Blackf. 293; *Massie* v. *Crawford*, 3 T. B. Mon. 218; *Tipton* v. *Triplett*, 1 Metc. 570; *McLoud* v. *Tutt*, 2 Miss. 288; *Ross* v. *Mather*, 47 Barb. 582; *Vanleer* v. *Earle*, 26 Pa. St. 277.

Representations of value, quality, situation and excellency, made by the owner, pending negotiations, are mere matters of opinion, for which no action will lie. *Schram* v. *O'Connor*, 98 Ill. 539; *Bantin* v. *Palmer*, 47 id. 99; *Miller* v. *Craig*, 36 id. 11; *Vernon* v. *Keyes*, 12 East, 632; *Hartman* v. *Flaherty*, 80 Ind. 472; *Saunders* v. *Halterman*, 2 Ired. L. 32; *Lyttle* v. *Bird*, 3 Jones' L. 222; *Crown* v. *Corriger*, 66 Ala. 590.

Statements of this kind do not relieve the purchaser from the responsibility of investigation. *Noetling* v. *Wright*, 72 Ill. 390; Kerr on Fraud, 84.

The law will not assist him unless deceit has been practiced against which ordinary care could not protect, (*Van-Horn* v. *Keenan*, 28 Ill. 448,) and there must be some means used to deceive or circumvent. *Railway Co.* v. *Rice*, 85 Ill. 406; *Fauntleroy* v. *Wilcox*, 80 id. 481; *Walker* v. *Hough*, 59 id. 375; *Sims* v. *Klein*, Breese, 302.

The rule of law in transactions between strangers is *caveat emptor*. If the purchaser has equal means of information, and may rely on his own judgment, founded on actual examination, an action will not lie for misrepresentations. *Hill* v. *Bush*, 19 Ark. 522; *Bell* v. *Henderson*, 7 Miss. 311; *Strong* v. *Peters*, 2 Root, 93.

When a purchaser, with full means of knowledge within his reach, relies upon his own judgment, he can not recover. *Post* v. *Williams*, 6 Ind. 219; *Veasey* v. *Dotin*, 3 Allen, 380.

Messrs. MONROE & TEWKESBURY, for the appellee, discussed the evidence at some length, to show that it sustained the declaration and the verdict of the jury, and also examined the instructions objected to, insisting that they properly stated the law of the case.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

As this case comes before this court on appeal from the Appellate Court, of course no controverted questions of fact can be considered.

It is objected the evidence does not sustain the case as stated in the declaration, and for that reason the motion for a non-suit should have been sustained. It is seen, on looking into the record, there is evidence tending to sustain the averments of the declaration, and that is sufficient to sustain the judgment, since, under the statute, the finding of the trial and Appellate courts precluded any inquiry as to the weight of the evidence. That would be to investigate controverted questions of fact, which is not allowable. The representations made by defendant as to the property situated in Kansas, which he was about to exchange with plaintiff, were much more than mere expressions of opinion as to its value and desirableness. Falsely stating the quantity of land contained in a certain tract, and the size and character of the improvements situated thereon, is quite a different thing from expressing a mere opinion concerning them. That is what the evidence in this case tends to show was the character of the representations made by defendant to plaintiff which are alleged to be false. Assuming the representations were false, as must be done, there is quite enough in the evidence to show the guilty knowledge on the part of defendant. There was, therefore, no ground for granting a non-suit.

It is said it is an elementary principle the purchaser of real estate can not rely on the mere statement of the vendor, and relieve himself in that way from the responsibility of an investigation. Under some circumstances, no doubt, the rule insisted upon should control; but in this case the land defendant was about to convey to plaintiff was situated in another State, many hundred miles away, and it would be unreasonable to apply the rule with any degree of strictness. Defend-

ant well knew it was not practicable for plaintiff to examine the property without subjecting himself to considerable expense and travel, and under the circumstances he was guilty of no negligence in relying on the statements of defendant as to the quantity of the land to be conveyed to him, the relative situation of the property, and the size and character of the improvements upon it. Had the property been conveniently situated, no doubt the omission to make the usual investigations might have been attributed to plaintiff as negligence, against which the law would not relieve him. It was distinctly told defendant by plaintiff that if the property was as he represented it to be, the trade would be consummated, as was done, and relying on the truth of such representations, as plaintiff might reasonably do, he was greatly overreached in the transaction.

It is insisted the declaration is not sufficient, because it does not aver the assignment of the lease of the building, which was sold with the stock of goods. At most, the objection taken rests on a defective pleading, which, at common law and under our statute, is aided by verdict. (*Barnes* v. *Brookman*, 107 Ill. 317; 1 Chitty's Pleading, 14th Am. ed. 673.) The rule on this subject, as stated by Chitty in his work cited, is, "that where there is any defect, imperfection or omission in any pleading, whether in *substance* or in *form*, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." That is precisely the case here, and the doctrine stated must control. It is averred in the declaration the lease was to be assigned, and proof was, in fact, made of the assigning of the lease,—hence the verdict on the evidence will be regarded as aiding the defective

pleading insisted upon. It may be added that in all cases where a defective or imperfect pleading will be aided by the verdict, if a party wishes to have any advantage from it he must make the objection at the trial, otherwise all advantage will be lost. In this case, as has been seen, the proof shows the lease was, in fact, assigned to defendant; and if the declaration contained no averment that would warrant the giving of the testimony, objection should have been made for that reason. Had that been done, plaintiff might have obtained leave from the court, under the statute, to amend his declaration on such terms as the court might deem equitable. Failing to obtain leave or amend his defective pleading, the objection, no doubt, would prevail.

It is made a point in the case that the instructions given for plaintiff do not present the case fairly, and are misleading. The criticism made upon the first instruction is, it assumes there is evidence the Kansas property could not be examined by plaintiff. This, it is thought, is not a correct reading of the instruction. It does not, in fact, assume anything, but simply assumes a hypothetical case, which, if the jury believe, from the evidence, existed, they were at liberty to consider,—and that is clearly allowable. The same objection is said to lie to the second instruction, and in addition thereto it is said it indulges the presumption there is evidence to show defendant knew the property in Kansas was not worth over $250,—that he told plaintiff he knew its value; that he induced Martin to make representations to plaintiff, and that plaintiff believed such representations. The latter objection to the second instruction is certainly not well taken. The propositions submitted by that instruction are all made to rest upon what the jury shall believe from the evidence, and by it no presumptions whatever are indulged. No objection is taken to the third instruction, other than those pointed out to the first and second of the series given, and which are found, on examination, to have no existence. Nor is the ob-

jection to the fourth instruction tenable. Like the objection taken to the other charges, it rests upon a mistaken view of the meaning of the instruction.

The court was asked by defendant, in the third proposition submitted, to instruct the jury that plaintiff is not entitled to recover in this case unless the jury believe, from the evidence, that the defendant made the representations alleged in the declaration, which it did, but the court added to the words quoted, "or some material part thereof." The objection taken is broader than a correct reading of the instruction will fairly warrant. It does not mean that plaintiff may recover if he proves some of the material representations alleged in the declaration, but that he must prove all that is material of such representations,—and, strictly speaking, that is the law. Plaintiff is, perhaps, not bound to prove the representations precisely as alleged, but he must prove the substance or the material parts of such representations, and more strictness than that the law does not require. It might be conceded this modification of the instruction was not entirely accurate, and still it seems impossible the jury could have been misled by it, for the law is stated precisely as defendant insists it is, in the context. In the first paragraph of the same instruction the jury were told it must appear, by a preponderance of the evidence, defendant intended to commit, and did commit, a fraud upon plaintiff in manner and form as charged in the declaration, otherwise he could not recover, and the jury should find for defendant. The law on this branch of the case was given to the jury as favorably by the court as defendant could ask to have it done, and it is improbable the jury could have been misled in the slightest degree by the modification made to the third instruction. This court has had frequent occasion to say it is not every trivial error that may appear in a record that will constitute ground for the reversal of the judgment, otherwise perhaps few judgments would be permitted to stand. Only such errors as

materially affect the merits of the case will justify a reversal of the judgment.

There is no just ground for any complaint the court refused proper instructions asked by defendant. The jury were fully instructed as to every phase of the case. Other instructions would have answered no good purpose, if given. Indeed, it seems that all that was contained in the refused instructions was comprised in those that were given, and the court did right to refuse to give the same propositions a second time, although couched in slightly different phraseology.

On the whole record considered, no error is discovered that seriously affects the merits of the case, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

DANIEL A. WALSH

v.

PATRICK J. WALSH *et al.*

Filed at Ottawa November 14, 1885.

1. NEW TRIAL—*absence of counsel—negligence.* On account of the sickness of defendant's counsel, the cause in which he was employed was set at the foot of the September calendar by consent, and after the death of the counsel so employed, the defendant employed other counsel in February following, who, supposing the cause was placed at the foot of the February calendar, in which case it would not be called for trial at that term, so informed the defendant, and directed him to wait for notice, and while such attorney was absent trying a cause in another county, the case was tried, and a verdict rendered against the defendant, and the court refused to set aside the verdict and allow a new trial: *Held*, that as the defendant was chargeable with some negligence, it could not be said the court abused its discretion in refusing to open the case and allow a new trial.

2. PRACTICE *in the Superior Court of Cook county—hearing before different judges in the same case.* A cause being called for trial in the Superior Court of Cook county, the presiding judge transferred the same into the branch of that court held by another judge, where it was tried, and a motion

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made by the defendant to set aside the verdict and allow him to defend. The judge of the branch court refused to consider the motion in respect to the regularity of the call in the other court and of the transfer, and directed the parties to appear before the other judge in respect to that matter, who overruled the motion in respect to the matters in his court, and on a further hearing the judge to whom the cause had been transferred, overruled the motion on the merits: *Held*, that there was no error in each judge passing upon so much of the proceeding as took place before him, and in the final overruling of the motion by the judge who tried the case.

3. PRACTICE—*of a second trial while a former verdict is still standing.* In 1881 a verdict was rendered in a cause in favor of the plaintiff, and afterward, in 1884, without its being set aside, another jury was called which rendered a verdict for the same amount in favor of the plaintiff, upon which judgment was rendered: *Held*, that as a mere verdict could do the defendant no harm, and as the court would render but one judgment, the irregularity worked no injury.

4. ERROR WILL NOT ALWAYS REVERSE—*as, where defence is availing under other issues.* Where all matters set up in special pleas are available in defence under the general issue, an error in sustaining a demurrer to the special pleas will not require a reversal of the judgment.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. JOHN LYLE KING, and Messrs. GARY, CODY & GARY, for the appellant.

Mr. P. MCHUGH, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought to recover upon a contract for the construction in part of a block of dwelling houses in Chicago. On December 12, 1881, a trial was had, and the jury rendered a verdict against the defendant for $1261.85. The next step appearing by the record is, that on March 25, 1884, the cause came on in its order on the calendar, and being called for trial, the plaintiffs came by their attorney, and the defendant being called and coming not, nor any one for him, a jury was called, evidence heard, and a verdict rendered for

$1261.85, against the defendant, upon which judgment was entered. On the next day, March 26, the defendant filed a motion to vacate the judgment and for a new trial, which motion the court overruled on April 5, 1884. On appeal to the Appellate Court for the First District the judgment was affirmed, and defendant took the present appeal to this court.

The circumstances under which the default occurred of the absence of the defendant and his counsel, were, that the late Judge Williams was defendant's attorney, and being in bad health in the last of October, 1883, by agreement between Mr. Woodbridge, representing him, and the plaintiffs' attorney, and by order of the judge, the cause was placed at the foot of the September calendar. Judge Williams died February 24, 1884, and soon after, the defendant took his papers away from the office of Judge Williams, and spoke of employing another attorney, and did so. This attorney appears to have labored under a mistake in supposing that the case had been placed at the foot of the February calendar instead of the September calendar, in which case, of the cause being at the foot of the February calendar, he considered it as equivalent to a general continuance until in April or May, and so informed defendant, and told the latter to await notice from him. On the 25th of March,—the day the case was called and tried,—this attorney was absent, at Wheaton, Du Page county, trying a case in the circuit court.

There certainly was more or less of negligence on the part of the defendant or his attorney in not knowing the situation of his cause as to when it would come on, in its order on the calendar, for trial, and we do not feel prepared to say there was in this case such abuse in the exercise of the discretionary power of the court in refusing to set aside the default, as to call for the interference of this court to disturb the decision in that regard.

Objection is taken to there being the action of two judges of the Superior Court in the decision of the motion. Sepa-

rate bills of exceptions, signed by the two judges, respectively, recite that in the branch of the Superior Court presided over by Judge ANTHONY, the cause came on in its order on the calendar, and was called for trial, and thereupon, by order of said judge, the cause was transferred for trial into the branch of said court presided over by Judge GARY; that the cause was there tried, and the motion to set aside the default made; that the latter judge declined to consider the motion in respect of the circumstances of the regularity of the call in Judge ANTHONY's court, and of the transfer of the case to Judge GARY's branch of the court, and directed the parties to appear before Judge ANTHONY in respect to that matter, and that Judge ANTHONY hearing the motion in respect of said circumstances, overruled the motion to that extent, and on further hearing before Judge GARY he considered the motion in the further respects bearing upon the merits of the case, or of the motion for a new trial, and overruled the motion. We perceive nothing improper in this course. Each judge appears to have passed upon so much of the proceeding as took place before himself, the result whereof was the final overruling of the motion by Judge GARY, before whom the trial was had.

Complaint is made that the prior verdict rendered on December 12, 1881, was standing in force, never having been set aside. It does so appear by this record. But it is not seen how this makes error in the judgment. Its being supported by two verdicts, instead of one, should not detract from its force. The mere verdict, of itself, does the defendant no harm. It is not to be supposed the court will enter a further judgment on that verdict.

It is urged there was error in sustaining a demurrer to the second, third, fourth and fifth pleas. Whether the demurrer was correctly sustained or not, the general issue was pleaded, under which the matters set up in the special pleas might have been given in evidence, and so the court's ruling did

the defendant no harm, and was not material error, as this court has often held in such cases.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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LOUISE EAMES MATHER

v.

THE CITY OF OTTAWA.

Filed at Ottawa November 14, 1885.

1. MUNICIPAL CORPORATIONS—*constitutional limitation of taxing power to corporate purposes.* Section 5, article 9, of the constitution of 1848, providing that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for *corporate* purposes, was a limitation upon the taxing power of the State, and under it taxation can not be imposed by such corporations except for corporate purposes.

2. SAME—*municipal aid to a merely private enterprise.* A municipal corporation is prohibited by that clause in the constitution from levying a tax in aid of a merely private enterprise, although the purpose may be one which will add to the wealth and prosperity of the municipality. Such a body can not incur a liability, and levy and collect taxes on the property of the citizen to aid in the development of mere private enterprises.

3. SAME—*municipal bonds in aid of that which was not a "corporate purpose."* In this case, bonds of the city of Ottawa were issued under an ordinance submitted to a vote of the people, and adopted thereby, which authorized the mayor to borrow, in the name of the city, the sum of $60,000, "for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes," and provided for the issue of bonds therefor. The bonds, when issued, were given to an agent of a private corporation, to be by him expended in the improvement of the water-power upon certain rivers within the city, and he negotiated the same to a person then residing in the city: *Held*, that the bonds so issued were void for want of power in the corporate authorities to issue them, the purpose for which they were issued not being a *corporate* purpose.

4. SAME—*inhabitants of municipality chargeable with notice of the contents and purposes of its ordinances.* All residents of an incorporated city are chargeable with notice of the contents of all ordinances passed for the

government and welfare of the city. So when an ordinance shows the purpose for which city bonds are issued, if a resident of the city buys them he will be held chargeable with notice of the purpose and object of their issue.

5. SAME—*municipal powers—generally.* A municipal corporation, being the creature of law, possesses only such properties and powers as its charter confers upon it, either directly or as incidental to its very existence. So long as it acts within its corporate powers it may bind the people within its limits, but when it transcends its powers, its acts are nugatory.

APPEAL from the Appellate Court for the Second District; —heard in that court on appeal from the Circuit Court of La Salle county; the Hon. GEORGE W. STIPP, Judge, presiding.

Mr. CHARLES E. TOWNE, for the appellant.

Mr. M. T. MOLONEY, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by Louise Eames Mather, in the circuit court of La Salle county, against the city of Ottawa, upon one hundred and twenty coupons, which were attached to certain bonds executed by the mayor and city clerk of Ottawa, under the authority of an ordinance passed by the city council of Ottawa, on the 15th day of June, 1869, and also an ordinance adopted on the 29th day of July, 1869, to carry out the ordinance of June 15th. The city of Ottawa was incorporated by an act of the legislature on the 10th day of February, 1853, and under the act of incorporation the city was intrusted with such powers as are usually conferred upon incorporated cities for the government of the people within the limits of such a corporation. Among the powers conferred may be found the following:

Article 5, section 1: "The city council shall have power and authority to levy and collect taxes upon all property, real and personal, within the limits of the city, not exceeding one-half of one per cent per annum upon the assessed value thereof,

and may enforce the payment of the same in any manner to be prescribed by ordinance not repugnant to the constitution of the United States and of this State."

Article 5, section 3: "The city council shall have power * * * to establish, support and regulate common schools, to divide the city into school districts, to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof: Provided, that no sum or sums of money shall be borrowed at a greater interest than at ten per cent per annum."

Article 10, section 20: "No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for by a majority of voters of said city attending an election held for that purpose."

On the 15th day of February, 1851, the legislature passed an act creating a corporation known as the Ottawa Manufacturing Company. The act is entitled "An act to authorize certain persons to construct a dam across Fox river for hydraulic and manufacturing purposes." Section 2 of the act is as follows:

"Section 2. The said company, when formed, are hereby authorized to build a dam across Fox river, on section 11 or 12, in township 33 north, of range 3 east, in La Salle county, for the purpose of creating a water power, and the said company may use, lease or otherwise dispose of the same, and may construct such other works, buildings and machinery as may be deemed necessary or proper to use such water, and to promote the interests and objects of the company."

On the 16th day of February, 1865, the legislature passed an act enlarging the powers conferred by the act of 1851, under which the company was empowered to build a dam across the Illinois river at such point as the company might elect, with the right to construct a race or races, for the purpose of introducing the water of the Illinois river into the pool of the dam authorized to be erected across Fox river.

On the 16th day of June, 1869, the city of Ottawa passed an ordinance, section 1 of which is as follows:

"Section 1. Be it ordained by the city council of the city of Ottawa, that the mayor of the city be and he is hereby authorized to borrow, in the name of the city, at a rate of interest not exceeding ten per cent, the sum of $60,000, for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes, and that bonds of the city be issued therefor in the sum of $500, with interest payable annually, said bonds to be payable one-third in five years, one-third in ten years, and one-third in fifteen years after the date thereof: Provided, that no application shall be made of the proceeds of said bonds except for the purpose aforesaid, and in pursuance of an ordinance to be passed for that purpose by the city council, nor until the faithful application of the proceeds of such bonds to the purpose aforesaid shall be fully secured to the city."

Section 3 required the ordinance to be submitted to the voters of the city for rejection or adoption at an election to be held for that purpose.

On the 30th day of July, 1869, an ordinance was passed by the city of Ottawa to carry into effect the ordinance of June 15, 1869, in which it was provided "that bonds of the city for the sum of $60,000 be issued by the mayor in accordance with the terms and conditions of said ordinance of June 15, 1869, and that he deliver the same to William H. W. Cushman, to be used by him in developing the natural resources and surroundings of the city, and that the said Cushman is authorized and directed to expend the same in the improvement of the water-power upon the Illinois and Fox rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose by the legislature of the State, or which may hereafter be granted for that purpose, in the manner in which his judgment shall best secure the practical and permanent use of

said water-power in the city and its immediate vicinity: Provided, that said Cushman shall execute and deliver to the mayor an agreement from him to the city of Ottawa, that he will, without unreasonable or unnecessary delay, cause a good, substantial and sufficient dam to be constructed across the Illinois river above the city, to bring into use all the available water-power of said river at Ottawa, and will construct sufficient head and tail races to make such water-power available." The ordinance also contained a provision that Cushman should bind himself that if the work was not constructed as provided by the ordinance, he would return the bonds or their value, and save the city harmless from all loss on account of interest. No money was borrowed by the city on the faith of the bonds, but on the 2d day of August, 1869, the bonds for $60,000 were issued and delivered to Cushman as a donation to aid in securing the water-power contemplated by the constructing of the dams and races heretofore mentioned. The coupons sued upon are a part of those attached to the bonds when they were issued, which provide for the payment of annual interest. The bonds upon which the coupons were attached were purchased by Lester H. Eames, agent for the plaintiff, in 1871. It also appears that Eames and the plaintiff were residents of the city of Ottawa at the time the ordinances were passed, and at the time the bonds were issued and delivered to Cushman.

All residents of an incorporated city are chargeable with notice of the contents of all ordinances passed for the government and welfare of the city. The ordinances under which the bonds were issued expressly state that the bonds were to be used "in developing the natural advantages of the city for manufacturing purposes." Appellant is therefore chargeable with direct notice of the object and purpose for which the bonds were issued and placed upon the market. There is therefore no question of innocent purchaser considered in the record.

The sole question here involved is one of power,—whether the city of Ottawa, under its charter and the constitution of the State, had authority to issue the bonds for the purpose for which they were issued. Municipal corporations are institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for the purpose of subordinate local administration, invested with a corporate character. (Dillon on Mun. Corp. sec. 9.) Chief Justice MARSHALL's description of a corporation is in these words: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

So long as corporations act within their corporate powers they may bind the people within their corporate limits; but when they transcend these powers, their acts are nugatory. The sections of the charter relied upon as conferring the power are comprehensive in their terms, but they must be considered in connection with that portion of the constitution of the State in force at the time the charter was enacted, which relates to the same subject. Article 9, section 5, of the constitution of 1848, which was in force when the bonds were issued, provides: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." This court has held, in a number of cases, that the clause of the constitution *supra*, is a limitation upon the taxing power of the State,—that taxation can not be imposed by a corporation except for corporate purposes. (*Johnson* v. *Campbell*, 49 Ill. 316; *Harward* v. *St. Clair Drainage Co.* 51 id. 130; *Madison County* v. *The People*, 58 id. 456; *The People* v. *Dupuyt*, 71 id. 653.) Cases may arise where it is difficult to determine whether a tax to be imposed may or may not be for a corporate purpose, but in this case, under our decisions,

it is manifest that a tax imposed to raise money to pay the bonds or the interest thereon, which were issued by the city of Ottawa, could not be for a corporate purpose.

As early as 1860, in *Johnson* v. *Stark County*, 24 Ill. 75, this clause of the constitution was considered, and in discussing what was and what was not a corporate purpose, the court said: "All will perceive that the building of our court houses, jails, poor houses, the opening and keeping in repair of common highways, and the erection and maintenance of bridges by which they are rendered useful to the people, are 'county purposes,' for which the people of the county may be taxed, and that the erection of hotels, mercantile, manufacturing, trading and banking houses, although of great importance to the prosperity of the community, are not such purposes as were contemplated by the framers of the constitution. These are properly regarded as matters of individual enterprise, and can not, in any reasonable or just sense, be regarded as public or county purposes." In *Bissell* v. *City of Kankakee*, 64 Ill. 249, where the city had issued certain bonds to the Douglas Linen Company, to enable it to embark in the manufacture of linen fabrics in that city, under a charter which gives the city "power to borrow money on the credit of the city, and pledge the revenue of the city for its payment, and issue bonds therefor," it was held that the bonds were issued without authority of law, and were void. In *English* v. *The People*, 96 Ill. 566, the question arose as to the validity of a tax levied to pay the principal and interest of certain bonds issued by a city to aid a private manufacturing company. It was held that a city tax levied for the payment of the principal and interest of bonds issued by the city, in aid of a private manufacturing corporation, can not be enforced, as such bonds are void, even in the hands of innocent purchasers. The same rule has beeen declared in other courts, when a similar question has arisen. See *Ohio Valley Iron Works* v. *Menardsville*, 11 W. Va. 1, and *Land Association* v. *Topeka*, 20 Wall. 655.

It may be, and probably is true, that the contemplated improvement of the water-power on the Illinois and Fox rivers in the city of Ottawa, if it had been judiciously and properly carried out, might have built up the city, and added greatly to its general growth, welfare and prosperity; but the establishment of any kind of manufactures which employed capital and labor within the city might have produced the same result, and yet the city would have no power to impose taxes to raise money to be devoted to such purposes. Whenever the tax is levied to aid in any private enterprise, it is prohibited by the constitution, although the object may be one which may add to the wealth and prosperity of the city. A municipal corporation can not incur a liability and levy and collect taxes on the property of the citizen to aid in the development of mere private enterprises; but the corporation may become indebted, for corporate purposes, where the purpose is one pertaining entirely to the interest of the public. Then the corporation may properly act, and the acts will be binding.

But aside from the authorities heretofore cited in support of the views here expressed, we have additional authority bearing directly on the validity of the bonds. A part of the bonds issued by the city were before the Supreme Court of the United States, in *Ottawa* v. *Cary*, 108 U. S. 110, and the court, after a careful review of the authorities, held that the bonds were void.

From what has been said, it follows that the evidence offered by appellant for the purpose of proving that the erection of the proposed water-power would have been of great benefit to the city of Ottawa and its business interests, increasing the value of taxable property, etc., was properly rejected by the court. Whether the proposed improvement would or would not have been of great benefit to Ottawa and its citizens was a matter of no moment. If the debt was not created for a corporate purpose, as we have seen it was not, the city had no power to incur the debt and issue the bonds.

The ruling of the circuit court in giving and refusing instructions was in harmony with the views herein expressed, and it will serve no useful purpose to consider the objections in detail made to the instructions.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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ADMINISTRATION OF ESTATES.
SALE OF LANDS TO PAY DEBTS. *Continued.*

debts against his or her estate, and that there be real estate to which the testator or intestate had "claim or title," and that the executor or administrator has made a just and true account of the personal estate and debts of the deceased, to the proper county court. Unless these jurisdictional facts appear on the face of the petition, the court has no power to make any order in the premises. *Harding* v. *Le Moyne et al.* 65.

4. *Character of title required, in order that the land may be sold.* On an application by an administrator for leave to sell land to pay debts and costs of administration, it is not material whether the deceased had the better title to the land sought to be sold or not, or, indeed, whether he had any title at all. It will be sufficient if the deceased, at his death, had a *bona fide* claim of title. Ibid. 65.

5. *Claim of title adversely—whether it should be interposed, and for what purpose.* In a proceeding by an administrator for leave to sell land to pay debts, the court, exercising but a mere statutory authority, has no jurisdiction to settle and determine conflicting titles to the land, or to remove clouds upon title. If the paramount owner of the land is made a defendant, it would doubtless be his duty to assert his rights to the same in his answer,—not for the purpose of forming an issue to be tried in that proceeding, but for the purpose of giving notice of his rights, and thus prevent an estoppel *in pais*. Ibid. 65.

6. *Of defences generally, to application to sell land to pay debts—and in what manner interposed.* The procedure upon appearance of the defendants being as in chancery, if the petition fails to state all the facts necessary to give the court jurisdiction, the defendants may demur to the same, or move in arrest, or treat the whole proceeding as a nullity. If the petition is good on its face, but in fact is untrue, an answer would be necessary, which may be a simple traverse of the facts alleged, or the answer may set up any special circumstances showing that the debts or claims for the payment of which the land is sought to be sold, are not *bona fide*, or legally binding on the estate or heirs. Ibid. 65.

7. *Decree of sale—its requisites, and the measure of relief it may give.* Whatever is necessary to effectuate the sale of the "title or claim" which the deceased had to the land sought to be sold, the court may lawfully do; but it must act on the title or claim as it finds it. The court must find the amount of the indebtedness, order the sale, fix its terms, and prescribe the manner of conducting it, so far as this is not done by the statute itself; and when made, the court may either approve it, or set it aside for proper cause. Ibid. 65.

8. As a necessary incident to the power to make the sale, the court must also determine whatever questions may arise in respect to the payment of the purchase money or the sufficiency of the conveyance, and, in short, all questions relating to the sale. In respect to the land, the

ADMINISTRATION OF ESTATES.

SALE OF LANDS TO PAY DEBTS. *Continued*

court can find only the fact that the deceased had title or a claim to the same, and the sale will be subject to all adverse independent claims of title. *Harding* v. *Le Moyne et al.* 65.

9. *Possession — how acquired by purchaser — power of the court ordering sale.* The court, whether the circuit or county court, under whose decree an administrator sells land to pay debts, has no right or authority of law to enter an order requiring the delivery of possession to the purchaser by parties claiming an independent title thereto. The purchaser must establish his right to the possession by an action in a court of law where legal titles are cognizable. Ibid. 65.

PAYMENTS TO AN EXECUTOR.

10. *Whether in money or property.* In the absence of any direction by will, an executor's duty is to collect notes given to the testator, in money. He has no authority to exchange the same for other property. *Means et al.* v. *Harrison, Exr.* 248.

11. So in a suit on a note against several, the defendants pleaded that the note was given for $500 of money loaned by the payee to a Masonic lodge, and that such lodge paid divers large sums of money on the note, and after the death of the payee, the plaintiff (the executor of the deceased payee) received from said lodge, in payment of the note, other property of the value of $1400: *Held*, that the plea was palpably bad, and presented no defence. Ibid. 248.

ADVANCEMENT.

12. *By father to son—death of son in lifetime of father—rights of children of the son—the statute of 1872 construed.* See ADVANCEMENT, 1, 2.

PROBATE OF WILLS.

13. *Within what time wills admitted to probate.* See WILLS, 1, 2, 3.

ADVANCEMENT.

BY FATHER TO SON.

1. *Death of son in lifetime of father—rights of children of the son—the statute construed.* The acceptance by a son of a conveyance of land from his father, in satisfaction of his share as prospective heir in the father's estate, will not only bar his own right to share in the distribution of the father's estate, real and personal, but also that of his children, in case he should die before his father. *Simpson et al.* v. *Simpson et al.* 603.

2. The fourth section of the act of 1872, to the effect that if a child receiving an advancement from his father dies before the father, leaving issue, the amount thereof shall be allowed accordingly by the representatives of the son so advanced, as so much of their share of the estate,

ADVANCEMENT. BY FATHER TO SON. *Continued.*

the same as if the advancement had been made directly to them, is not confined to cases of advancements made to a son after such act took effect, but applies equally to advancements made before that time, when the party making the same dies after the law took effect. *Simpson et al.* v. *Simpson et al.* 603.

ADVERSE TITLE.

SALE OF LANDS TO PAY DEBTS.

Claim of title adversely—whether it should be interposed, and for what purpose. See ADMINISTRATION OF ESTATES, 5.

AGENCY.

GENERAL AGENT.

1. *What constitutes.* Power to act generally in a particular business, or a particular course of trade in a business, however limited, constitutes a general agency, if the agent is so held out to the world, however restricted his private instructions may be. *Crain et al.* v. *First National Bank of Jacksonville,* 516.

HOLDING ONE OUT AS AGENT.

2. *As affecting liability of principal.* On an issue as to an agent's authority to borrow money, and give a note therefor, in the name of his principal, the court modified an instruction of defendant, that when an agent acts beyond his authority the principal is not bound, unless he had held out to the party dealt with, the agent as having authority to do the act, by adding after the words "dealt with," and before the words "the agent," the words, "or to the public generally:" *Held,* that there was no error in the modification. Ibid. 516.

RATIFICATION BY PRINCIPAL.

3. *Of acts of agent.* Where a contract entered into on behalf of a named principal, is one which the principal himself might lawfully make, it may be ratified by the principal, and thus given effect. Such ratification may be shown by circumstances, or it may be inferred by acquiescence after notice. *Connett* v. *City of Chicago,* 233.

PRINCIPAL AND AGENT.

4. *Whether agent liable to his principal for errors of judgment in the management of the business of the latter.* Where an agent or manager of another is clothed with a general discretion in the management of the business intrusted to him, he will not be held responsible for an honest mistake in its exercise, provided he acts with reasonable skill and ordinary diligence. In such case there is no implied guaranty of the success of the business on the part of the agent, and if losses occur, the principal must bear them. *Schmidt* v. *Pfau,* 494.

AGENCY. *Continued.*

AGENT'S COMMISSIONS—LIEN ON MARGINS.

5. *Forfeiture of agent's commissions and lien on margins—recovery by principal.* An agent employed to make a contract in his own name, for the purchase of grain, to be delivered at a future day, for his principal, and to whom his principal has advanced the required margins to protect him from loss, and who, after receiving all the margins required, closes out the deal and thereby sells at a loss, in violation of his contract, will lose his lien on the margins in his hands, and his commissions; and the principal may, under the common counts in assumpsit, recover of him all the margins so advanced by him to the agent. *Larminie* v. *Carley*, 196.

INSURANCE BROKER.

6. *Payment of premium to insurance broker—liability of insurance company—a question of agency—evidence in respect thereto.* See INSURANCE, 8, 9.

BANK OFFICERS.

7. *As agents of the bank.* See BANKS AND BANKING, 6 to 10.

ALLEGATIONS AND DECREE. See CHANCERY, 35, 36.

ALIMONY. See DIVORCE AND ALIMONY, 2.

AMENDMENTS AND JEOFAILS.

OF DECLARATION—WRIT AND PLEADINGS.

1. *As to capacity in which plaintiff sues.* The widow of a person insured against accidents, improperly brought suit upon the policy or certificate in her name, as administratrix, the policy being made payable to her. Before the trial she amended her declaration, by leave of court, by striking out the word "administratrix," after her name. Thereupon the defendant moved to strike the declaration from the files, because of a variance from the summons, and the court then allowed an amendment of the writ and all other papers, so that they might correspond: *Held*, that the amendments allowed were fully authorized by section 24 of the Practice act. *National Benefit Association* v. *Jackson*, 533.

IN CHANCERY.

2. *How far matter of discretion.* The granting of leave to amend the pleadings in chancery cases rests in the discretion of the court; and unless there is an abuse of discretion, the action of the court will not be the subject of review. *Gordon et al.* v. *Reynolds*, 118.

3. *Amendment of bill—to avoid a variance—at what time.* An amendment of a bill in chancery is properly allowed on the hearing, in furtherance of justice, to avoid the effect of a variance from the proofs. It is not material when amendments are permitted to be made, except as to the terms the court may impose as a condition thereto. Ibid. 118.

AMENDMENTS AND JEOFAILS. IN CHANCERY. *Continued.*

4. *Bill unnecessarily sworn to.* Where a bill is not required by law to be verified by the oath of the complainant, the fact that it is unnecessarily so verified affords no ground for refusing leave to amend the same. *Gordon et al.* v. *Reynolds*, 118.

5. *Striking from the files an amendment to answer—discretion of the court.* See CHANCERY, 11.

AMENDMENT OF THE RECORD.

6. *Allowable during the term.* The circuit court has the power, at any time during the term, to allow an amendment of its record, so that it may conform to the facts. In this case the record was amended so as to show that suggestions of damages were filed upon the dissolution of an injunction, before the question had passed from the control of the court, and it was *held*, that the court during the term had power to allow the amendment. *Drummond Tobacco Co.* v. *Randle et al.* 412.

INSTRUCTIONS.

7. *Amendment of instructions by erasure -- leaving words still legible.* See INSTRUCTIONS, 9.

DEFECT IN PLEADING.

8. *Cured after verdict.* In an action for fraud and deceit in the exchange of land with the plaintiff for a leasehold interest in a building, and the goods therein, if the declaration fails to aver the assignment of the lease by the plaintiff, which was sold with the stock of goods, it will be too late to object to this defect in the pleading after trial and judgment. *Ladd* v. *Pigott*, 647.

9. But if a declaration omits to allege any substantive fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. *Bowman* v. *The People*, 474.

APPEALS AND WRITS OF ERROR.

WHETHER AN APPEAL WILL LIE.

1. *From an order in vacation dissolving temporary injunction.* The mere dissolution of a temporary injunction in vacation is not an order from which an appeal will lie in any case, as the injunction may be made perpetual on the final hearing. *Lucan et al.* v. *Cadwallader et al.* 285.

ORDER ALLOWING APPEAL.

2. *As to the scope of the order—to whom granted.* On rendering judgment against lands and lots for delinquent taxes, the county court entered an order "that all parties praying an appeal from this judgment file their appeal bond in the sum of $250," etc., within twenty days; and it was further ordered that in appeals by the People no bonds need be filed: *Held*, that the legal effect of such order was to grant an appeal either to the People or any land owner aggrieved by the judgment; and

APPEALS AND WRITS OF ERROR.

ORDER ALLOWING APPEAL. *Continued.*

that where the county attorney gave notice of an appeal, and prepared and filed a bill of exceptions on behalf of the People as to certain lands, this was an appeal by the People. *Crain, Jr.* v. *Peacock*, 347.

RIGHT OF DISMISSAL.

3. *By agreement.* The appellant in this court may dismiss his appeal at his own costs, when the suit brought by him is not one to enforce a public right. *Adkinson* v. *Gahan et al.* 21.

4. In this case the appellant filed his bill in equity as a citizen and tax-payer of the town of Lake, to restrain the trustees of the town from making payment to one of their number, the supervisor of the town, of two per cent on all moneys coming into his hands for the fiscal year 1884-85, which was dismissed on demurrer, and he brought the case to this court by appeal, and during the pendency of the appeal moved the court to dismiss the same, on stipulation of the parties that it should be dismissed, and the motion was allowed. Ibid. 21.

REVIEWING FACTS.

5. This court, in reviewing ordinary cases at law coming to it through the Appellate Court, sits simply to correct errors of law committed in the lower court. If the trial court makes no improper ruling, and the judgment is affirmed in the Appellate Court upon mere issues of fact, this court will not reverse on the ground that the issues were improperly decided. And this is equally so although there may be no conflict in the testimony on which the issues are found. *Sun Mutual Ins. Co.* v. *Saginaw Barrel Co.* 99.

6. Where a judgment in favor of a plaintiff in an action of assumpsit is affirmed by the Appellate Court, and there is evidence in the record tending to establish the plaintiff's theory of the case, no assignment of error can be permitted which calls in question the finding of the facts by the trial and Appellate courts. *Larminie* v. *Carley*, 196.

7. On the trial of a case by the court without a jury, the court decided to admit in evidence any letters, telegrams or communications from the defendant to his agent, provided they were shown to the plaintiff or the contents in any way communicated to him by the agent; but as to what letters or telegrams were shown the plaintiff, or their contents made known to him, the evidence was conflicting: *Held*, that the finding of the trial court as to what communications had been shown or made known to the plaintiff, was reviewable only by the Appellate Court, and that it would be presumed the trial court observed the rule of evidence it adopted. Ibid. 196.

8. *On the question of excessive damages.* Whether the amount of damages recovered by a plaintiff in an ordinary action *ex contractu* is excessive or not, is a question of fact, which this court can not consider on appeal from the judgment of the Appellate Court, affirming the judgment of the trial court. Ibid. 196.

APPEALS AND WRITS OF ERROR. REVIEWING FACTS. *Continued.*

9. *When found by the Appellate Court.* The statute makes it the duty of the Appellate Court, where its judgment is the result of its finding the facts differently from that of the trial court, to state, in its final judgment or decree, the facts as found by it; and when that court does so recite its finding, its decision as to the facts found is conclusive, and can not be reviewed by this court. *Williams* v. *Forbes, Admr.* 167.

AS TO THE AMOUNT INVOLVED.

10. *In actions sounding in damages.* An action of assumpsit to recover damages for the breach of a contract, whereby the plaintiff alleges he has lost the good will of an established business, though in form an action *ex contractu*, is an action sounding in damages, within the meaning of section 8 of the Appellate Court act, and no appeal or writ of error lies to review the judgment of the Appellate Court affirming a judgment in such a case for less than $1000. *Bradshaw* v. *Standard Oil Co.* 172.

11. An action sounding in damages, within the meaning of the statute relating to appeals and writs of error from or to the Appellate Court, is one where the damages can not be determined in dollars and cents by witnesses, but certain facts are proven, and from those facts the jury determine the amount of damages, as in slander, and the like. The words, "sounding in damages," were intended to include all cases, whether the action is *ex contractu* or *ex delicto*, when the damages are not susceptible of direct proof. Ibid. 172.

WHETHER FRANCHISE INVOLVED.

12. Where a bill seeks to enjoin the incorporation of a company by a given name, adopted in the preparatory steps and proceedings, an appeal lies directly from a decree of the circuit court dismissing the bill, to this court, as a franchise is involved. *Drummond Tobacco Co.* v. *Randle et al.* 412.

WHETHER FREEHOLD INVOLVED.

13. *As to mere easement in lands of another.* A bill to enjoin a defendant from rebuilding a mill-dam, and thereby prevent the overflowing of the complainant's land, etc., does not involve a freehold, so as to justify an appeal directly to this court from the trial court. A claim of an easement in the lands of another does not constitute a freehold in such lands. *Lucan et al.* v. *Cadwallader et al.* 285.

14. *A bill in chancery to enjoin an owner of a city lot* from erecting a building upon a strip of ground along the front of the lot, reserved in the deed by the grantor as an easement, involves no question of freehold, and no appeal lies directly to this court from the final decree of the circuit court. Such a strip amounts, at most, only to an easement. *Eckhart et al.* v. *Irons et al.* 469.

COMMITMENT FOR CONTEMPT.

15. *Appeal from order of commitment—what it involves.* On an appeal from an order of the court committing a defendant to the county

APPEALS AND WRITS OF ERROR.

COMMITMENT FOR CONTEMPT. *Continued.*

jail for refusing to obey a prior order requiring him to assign and hand over certain property to a receiver, no error in such prior order can be considered. The only question as to such prior order that can be considered, is, whether the court had jurisdiction to make it. It matters not, so far as the question of condemnation is concerned, whether such order was made on sufficient proof or not. *Tolman* v. *Jones et al.* 147.

TRIAL DE NOVO.

16. *On appeal—effect as vacating judgment appealed from.* The effect of an appeal from an inferior to a superior tribunal, when the latter is required to try the question appealed from *de novo*, and render thereon such decision as in its opinion should be rendered under the law and the evidence, is to vacate and set aside the decision of the inferior tribunal. This applies to appeals from the orders of commissioners of highways on petition to lay out or vacate roads. *Pool et al.* v. *Breese*, 594.

IN THE MATTER OF HIGHWAYS.

17. *Appeals in proceedings for the laying roads, etc.* See HIGHWAYS, 1 to 6.

SALE FOR TAXES.

18. *Pending an appeal by the People from the judgment, void.* See TAXATION AND TAX TITLES, 4.

ARBITRATION AND AWARD.

INFLUENCING ARBITRATORS.

1. *Attempt by one of the parties to improperly influence an arbitrator—ground for setting aside the award.* It is sufficient to authorize a court of equity to enjoin a suit at law upon an award, and set aside the award, that one of the parties in interest made a statement to one of the arbitrators, in the absence of the adverse party, designed and having a tendency to improperly affect his decision as an arbitrator, without showing that such statement, in fact, produced any harmful result to such other party. *Catlett et al.* v. *Dougherty et al.* 568.

2. A party to an arbitration who by overt acts attempts to corrupt or improperly influence the arbitrators, or any one of them, to make an award in his favor, will not be heard to say that he was impotent to accomplish what he sought, and to raise an issue thereupon. Ibid. 568.

POWERS OF CITY ATTORNEY.

3. *Validity of agreement by city attorney to submit question of the city's liability to arbitration—city neither disaffirming nor ratifying.* See CITY ATTORNEY, 3.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS. See INSOLVENT DEBTORS, 1, 2, 3.

ASSIGNMENT OF DOWER.

EVIDENCE.

1. *Effect of subsequent deed to same grantee, for other lands.* See DOWER, 4.

PARTIES.

2. *Lands held in severalty—against whom dowress may proceed.* Same title, 5.

AUDITOR OF PUBLIC ACCOUNTS.

SUPERVISION OVER INSURANCE COMPANIES.

Assuming to insure without legal authority—proceedings on the relation of the Auditor, by quo warranto. See QUO WARRANTO, 1.

BANKS AND BANKING.

BANK CHECK.

1. *As a transfer of money deposited, pro tanto.* If a depositor draws a check upon his banker who has funds to an amount equal or greater, it operates to transfer the sum named in the check to the payee, who may sue for and recover the same in his own name. *National Bank of America* v. *Indiana Banking Co.* 483.

2. *Check in favor of cashier, whether evidence of fraud.* The fact that a check is drawn by a depositor of funds in a bank, in favor of the cashier of such bank, just previous to the service upon the bank of garnishee summons, is not of itself evidence of fraud or want of good faith. It is as lawful for an attachment debtor to draw his check in favor of the garnishee as in favor of any one else, if done in good faith before the service of process, and the garnishee will be entitled to credit for the amount named in the check, in the absence of evidence impeaching the transaction for fraud. Ibid. 483.

3. *By what law governed, when drawn in one State and payable in another.* A check drawn by a depositor in the State of Indiana, on his banker, payable in this State, will be construed by the laws of this State, and operate to transfer the sum named therein in accordance with the laws of this State, notwithstanding a different rule obtains in the other State. Ibid. 483.

4. *Checking against deposits—payments after service of garnishee process.* See GARNISHMENT, 2, 3.

APPLICATION OF DEPOSITS.

5. *Applying the fund to payment of obligation of depositor to the bank after service of garnishee process.* See GARNISHMENT, 4.

BANK OFFICERS—AGENCY—EVIDENCE.

6. *Of the authority of a cashier to bind the bank—custom of banks to borrow money.* In a suit against a firm of private bankers, upon a note given by their clerk and cashier for money borrowed by him in the

BANKS AND BANKING.
BANK OFFICERS—AGENCY—EVIDENCE. *Continued.*

firm name and appropriated to his own use, in which the cashier's authority to give the note is put in issue, evidence of the custom of bankers at the place in which the defendant's bank was located, to borrow money on time, is proper, as tending to show that the borrowing of money was within the scope of the ordinary and customary business of the defendants. *Crain et al.* v. *First National Bank of Jacksonville*, 516.

7. *A paper given to a third party containing the signatures of those authorized to bind the defendant bank — as evidence of their authority.* In the same suit it was *held*, a paper, directed to another and distant bank, giving the signatures of persons authorized to sign for the defendants, one of which was in the hand-writing of the cashier and another that of one of the defendants, was proper evidence as an admission of the defendant signing the same, of the cashier's authority to bind the defendants by the execution of a note in their firm name. And the fact that the payee of the note did not act on the faith of such paper, though detracting from its weight, did not render it irrelevant and improper. Ibid. 516.

8. *As to prior fraudulent acts of cashier with others.* In a suit upon such a note, proof of other fraudulent drafts drawn by the cashier upon other banks is not admissible, without any attempt to show knowledge of such drafts by the payee before making the loan to the cashier. Ibid. 516.

9. *Giving of notes belonging to the bank as collateral for the cashier's loan, whether notice of cashier's want of authority in the particular transaction.* The giving as collateral security, by a cashier of a private bank, notes of other persons, of over $5000, of his bank, to secure a note of that amount given by him in the name of his principals, with authority, on maturity of the latter note, to sell the collaterals at public or private sale, with or without notice, and apply the proceeds to the payment of the note given, is not of such a nature as to afford notice to the party making the loan and taking the notes, of the cashier's want of authority to execute the note for the bank, or of fraud in giving it. Ibid. 516.

10. *As to general operations of the bank, and the cashier's connection with them, as showing his authority—an instruction on that question.* In a suit by A against C & D, private bankers, upon a note given by the cashier of the bank in the firm name of the defendants, in which the cashier's authority was put in issue, the court instructed the jury, that if they believed, from the evidence, that the defendants were bankers at W., and that the person making the note was their cashier, and intrusted by them with the general management of their bank and the power to carry on all their general banking operations, and that it was one of the usual operations of a bank at W. and its vicinity to borrow money

BANKS AND BANKING.

BANK OFFICERS—AGENCY—EVIDENCE. *Continued.*

on time and execute a note therefor, and that such person, while acting as cashier and manager for the defendants, borrowed in their name, of the plaintiff, $5000, and thereupon executed and delivered to the plaintiff the note sued on, they should find for the plaintiff: *Held*, that the instruction was properly given, and that it was not faulty in not defining the meaning of "general manager," or what constituted general management, or in ignoring the question of notice of the agent's want of authority, when there was no sufficient evidence of such notice. *Crain et al.* v. *First National Bank of Jacksonville*, 516.

BANKRUPTCY.

TRUST PROPERTY.

Effect of bankruptcy upon trust property in the hands of bankrupt. See MORTGAGES AND DEEDS OF TRUST, 6.

BROKER.

INSURANCE BROKER.

Payment of premium to insurance broker—the question one of agency, and of evidence in respect thereto. See INSURANCE, 8, 9.

BUILDING AND LOAN ASSOCIATION.

ACT OF 1872.

1. *Validity of the act—usury.* The decision of this court in *Holmes et al.* v. *Smythe et al.* 100 Ill. 413, that the act for the incorporation of loan associations is not unconstitutional, and that loans made according to its provisions are not usurious, is adhered to and followed. *Freeman et al.* v. *Ottawa Building, Homestead and Savings Association*, 182.

CHARTER CONSTRUED.

2. *Forfeiture of stock for non-payment—notice.* Where the charter of a loan association authorizes the forfeiture of a member's stock for a failure to pay the prescribed assessments on his stock and the interest on a note given by him for money loaned him, together with the premium bid by him, the courts will not relieve him from a forfeiture for a willful neglect to make such payment; and a forfeiture may be declared in such case without notice to him, and the full amount due on his note collected. Ibid. 182.

BY-LAWS.

MUTUAL BENEFIT ASSOCIATION.

As entering into the contract of insurance. See INSURANCE, 4.

CANAL LANDS.

LEGAL TITLE—ALIENATION.

1. *Legal title held by the State.* The legal title to the canal lands granted by Congress to this State was not originally held by the canal trustees, but by the State itself, and such title was passed only by patents issued by the State and signed by the Governor. *Lyman* v. *Gedney*, 388.

2. *Donations to and sales by counties.* Under the act of 1831 the canal commissioners were authorized to give lots in any county town laid out by them, not exceeding ten acres, to aid in the erection of public buildings, and the Governor was required to issue patents therefor; and in case of any such donation, the county commissioners of Cook and La Salle counties were authorized to sell such lots so donated to them, respectively, when they might think best, and apply the proceeds to the erection of a court house and jail in each county seat. Ibid. 388.

3. In this case the canal commissioners, in 1837, laid out and platted the town of Ottawa, in La Salle county, but the plat was not acknowledged, as required by the law then and since in force. Upon the plat, block 11 was divided into eight lots, and across the block were written the words, "public square." The State issued its patent to La Salle county for lots 1 to 8, inclusive, of block 11, after which the county commissioners sold and conveyed lots 1 and 2 of the block to private persons, which sales were, in 1841, ratified by the State legislature: *Held*, that the legal title, by these several acts, was vested in the grantee of the county, and the public had no longer any right or title to such lots. Ibid. 388.

CEMETERIES.

POWER TO MAKE BY-LAWS, ETC.

1. *Rules and regulations — uniformity of application required.* Where the charter incorporating a cemetery company provides for a board of managers, who are authorized to lay off the grounds into lots, sell the same, make by-laws, and such rules and regulations for the government of lot owners and visitors as they may deem necessary, they may make such rules and regulations; but they must be reasonable, equal in their operation, and uniform in their application to all owners of lots in the cemetery. The managers will have no right to make a rule which will confer a right upon one owner in regard to the improvement of his lot, and deny the same right to another lot owner. *Rosehill Cemetery Co.* v. *Hopkinson, Ex'x.* 209.

2. Such a company being a *quasi* public corporation, and possessed of the right to condemn property, and invested with other important powers, is bound to exercise its rights and privileges fairly and impartially; and if, through its officers, it attempts to act arbitrarily, or to transcend its powers to the injury of a lot owner, such action may be reviewed and controlled by the courts. Ibid. 209.

CEMETERIES. *Continued.*

BUILDING VAULT UPON LOT.

3. *Rights of the owner—of rules in restriction thereof.* If the board of managers of a public cemetery company incorporated by law, have authority, under their charter, to prevent a lot owner from erecting a vault upon his lot, that power can only be exercised by the adoption of a general rule on the subject applicable to every one. *Rosehill Cemetery Co.* v. *Hopkinson, Ex'x.* 209.

4. A rule adopted by the board of managers of an incorporated cemetery company, that "no vault shall be built entirely or partially above ground without permission of the company," taken in connection with another that no vault shall be constructed in the cemetery until the designs and specifications of the same, with a diagram of location, shall have been submitted and approved by the board, can not be regarded as prohibiting the erection of a vault; and in the absence of a rule prohibiting such erection as to all persons, the board of managers have no power to establish a rule governing a particular case. Ibid. 209.

5. In this case the company had no rule prohibiting the erection of vaults within the cemetery, but was acting under a rule requiring designs, specifications and a diagram to be submitted. This was fully complied with by the owner, who proposed to erect a vault upon his lot, and no objection was made as to the design and specifications, and the question of granting leave to erect the vault was left to the decision of the landscape gardener, who decided to grant the permission, and the owner then made a contract for the building of the vault, and the contractor proceeded with the work until prevented by the officers and agents of the company. It also appeared that many vaults had been allowed to be built in the cemetery: *Held*, that the court properly granted a decree, at the instance of the lot owner, enjoining the company from interfering with the work or preventing the erection of the vault. Ibid. 209.

CHANCERY.

JURISDICTION.

1. *To try legal titles.* Where the defendant is in the possession of land, a court of equity will not take jurisdiction of a bill to try the legal title of the complainant to the same. A court of law is the proper forum for the trial of legal titles to land. *Parker et al.* v. *Shannon*, 192.

2. Where the main object of a bill in chancery is the recovery of possession from a judgment debtor, of lots which had been sold upon execution against him, and to have it found that title to the property was acquired under the execution sale, a court of equity will not be invested with jurisdiction to pass upon the legal title, merely from the fact that the bill also seeks to obtain an injunction to prevent the commission of waste or irreparable injury to the property. In such case the court should only stay, temporarily, the doing of any irreparable injury, until the fur-

CHANCERY. JURISDICTION. *Continued.*

ther order of the court and a trial of the question of title in a court of law. *Parker et al.* v. *Shannon*, 192.

3. *To enforce legal rights, as distinguished from those which are merely equitable.* It does not follow that because rights are legal ones they are not cognizable in a court of equity. If there are any equitable conditions authorizing that court to act at all, it will, if necessary to do complete justice, enforce legal as freely as equitable rights. In exercising its jurisdiction when it has once attached, it is wholly immaterial whether the rights to be enforced are purely legal or are merely equitable in their character. *Tunesma* v. *Schuttler*, 156.

4. *Set-off against judgment at law.* A court of equity will not assume jurisdiction to set off unliquidated damages claimed by the principal judgment debtor against a judgment, where no reason is shown why the remedy at law is not adequate and complete, and it is not made to appear that the judgment creditors are insolvent. The fact that one of them is a non-resident of the State and the other of the county, does not show that a legal demand may not be recovered of them, or one of them, at law. *Aholts et al.* v. *Goltra et al.* 241.

5. *When there is a remedy at law—generally—dismissal on demurrer.* Where it appears that a complainant has a full and complete remedy at law, his bill may be dismissed on demurrer for want of equity. If any reason exists why the remedy at law is not available, it should be alleged. Ibid. 241.

6. *Granting complete relief, although in respect to some of the elements in the case there was a defence at law.* While, as a general rule, where a party has an adequate remedy at law, a court of equity will not intervene, yet where equity has acquired jurisdiction of a case, such as a bill for partition of land, and to have a written contract respecting other lands specifically enforced, the court, on decreeing the equitable relief sought in that regard, may also enjoin the enforcement of a judgment against the complainant in a forcible detainer suit for possession of the land, although he might have defended that suit successfully at law. *McDowell* v. *McDowell*, 255.

PLEADING IN CHANCERY.

7. *Allegation of want of notice of application for confirmation in a proceeding for special assessment.* An allegation in a bill seeking to enjoin proceedings for the collection of special assessments for park purposes, that "complainants are advised and believe, and therefore charge the fact to be, that no sufficient notice of the application for confirmation of said assessment was given," is but the statement of a conclusion of law. If a notice was given, the legality of which is denied, it should be specifically set out, that it may be seen whether it conforms with the requirement of the law. *Kedzie et al.* v. *West Chicago Park Commissioners*, 280.

CHANCERY. *Continued.*

DISMISSAL OF CAUSE.

8. *For want of equity or for want of prosecution—which is proper.* A bill in chancery was filed April 21, 1880, on which a summons issued, which was returned not found, and on June 10, following, all the defendants except one answered. Replication was filed on June 28. No further steps were taken in the cause until December 3, 1880, when the following order was entered: "This cause being this day called for hearing, come the defendants, by their solicitors, and the complainant comes not, nor does any one for her, and on motion of defendants it is ordered that this cause be and is hereby dismissed at complainant's costs, for want of equity:" *Held*, that the dismissal for want of equity was erroneous. The proper order would have been a dismissal for want of prosecution. *Cleaver* v. *Smith et al.* 114.

9. *Case improperly placed on trial docket.* If a chancery cause is through inadvertence set upon the trial docket before it is ready for hearing, it is the duty of the complainant to have the order placing the case on such docket, set aside; and if he does not, he can not complain that the cause is dismissed for want of prosecution when reached, in his absence, on the call of the docket. Ibid. 114.

AMENDMENTS.

10. *How far matter of discretion—amending bill to avoid variance, at what time—when bill is unnecessarily sworn to.* See AMENDMENTS AND JEOFAILS, 2, 3, 4.

11. *Striking from the files an amendment to answer in chancery—discretion.* In a suit by a wife for divorce, on the ground of desertion, upon which an issue of fact was submitted to a jury, the defendant, by leave of court, after the jury had retired, filed an amendment to his answer, setting up that the marriage was void for the reason that the complainant, at the time of her alleged marriage with him, had a husband then living, the court, after the verdict, on motion, ordered this amendment to be stricken from the files: *Held*, that the motion to strike the amendment from the files was addressed to the discretion of the court, and that the action of the court could not be the subject of review unless it was made to appear that the defendant was thereby deprived of some substantial right. *Johnson* v. *Johnson*, 611.

12. *Amending cross-bill—failure to grant leave.* Where a demurrer is properly sustained to a cross-bill which shows no ground for affirmative relief, and the record fails to show that leave to amend the same was asked, or that any amendment could have been made, consistent with the facts as proved, which could have obviated the objection thereto, an objection that no time was given to amend the cross-bill is destitute of merit. *Rankin* v. *Barcroft & Co. et al.* 441.

SWORN ANSWER.

13. *Effect of the testimony of defendants in its support, as to the weight of evidence to overcome the answer.* Where a defendant in a

CHANCERY. SWORN ANSWER. *Continued.*

suit in equity answers under oath, as required, denying the allegations of the bill, his testimony as a witness in his own behalf can not add any weight to his sworn answer, as evidence, and it may be overcome by the testimony of two witnesses, or what is equivalent thereto. *Catlett et al.* v. *Dougherty et al.* 568.

14. Where two defendants to a bill in chancery requiring sworn answers, each answers, and also testifies as to his own conduct and declarations, alone, and the proof shows that only one is a party in interest, neither the answer nor the testimony of the one will strengthen or aid the answer or evidence of the other, and the testimony of two witnesses, or what is equivalent thereto, will overcome the answer. Ibid. 568.

STRIKING ANSWER FROM FILES.

15. *In a suit for divorce.* It is error to strike a defendant's answer to a bill of divorce from the files, after it has been filed by counsel, merely upon proof of a communication sent by the defendant to his solicitor, which the latter never received, to let the suit go by default. *Shaw* v. *Shaw*, 586.

INTERLOCUTORY DECREE.

16. *Submission to opposite solicitors.* Where an interlocutory decree is clearly supported by the evidence, and is in accordance with the minutes of the judge, and it is approved and adopted in the final decree, a reversal will not be made for the reason that the same was not submitted to solicitors on the other side, before being signed by the chancellor. *Rankin* v. *Barcroft & Co. et al.* 441.

REMOVING CLOUD UPON TITLE.

17. *Complainant must have the title.* On bill to set aside a deed as a cloud upon the title to complainant's land, it is incumbent on him to prove title in himself when that is put in issue by the answer. It is not sufficient that the defendant's claim is under a merely colorable title. *Ritchie et al.* v. *Pease*, 353.

MISTAKE.

18. *In the description of land in deed of assignee in bankruptcy—correcting as against creditors.* It does not follow that a deed of an assignee in bankruptcy will be rectified in equity merely because of a mutual mistake between the assignee and the purchaser as to the description of the land attempted to be sold. The creditors of the bankrupt have an interest in the question. In such case the bankrupt court may order the proper land to be sold by its correct description. Ibid. 353.

GIVING POSSESSION OF LAND.

19. *Power of a court of equity to give possession of land—exceptions to the general rule.* Courts of equity in the exercise of their ordinary and general chancery jurisdiction, where the right to possession of real property is involved or liens thereon are to be enforced, and all

CHANCERY. GIVING POSSESSION OF LAND. *Continued.*

persons in interest are made parties, may, upon the consummation of the suit, do complete justice by putting the successful claimant into possession. And on a sale in a proceeding to foreclose a mortgage or enforce a lien, the court may extend the same relief to a purchaser under the decree. *Harding* v. *Le Moyne et al.* 65.

20. But this rule has its exceptions. Thus, if one, pending the suit, enters not under a party thereto, or under one who had not derived title to the premises, or had gone into possession under a party pending the suit, he can not be turned out of possession under the decree. So in case of a foreclosure sale, if the person in possession shows a right paramount to the mortgage, the court will not attempt to decide any question of legal title, and the possession must then be sought by proceedings at law. Ibid. 65.

STOCKHOLDER'S LIABILITY—REMEDY.

21. *Enforcement in chancery—to the exclusion of the remedy at law.* A bill filed by certain creditors of an insolvent banking corporation, on their behalf and for all other creditors, against the several stockholders in the same, alleged the insolvency of the bank, a deficiency in assets to pay its creditors, the personal liability of stockholders, under the charter, to the depositors and creditors, the existence of some nine hundred unpaid depositors, some of whom were seeking, by separate suits at law, to get an advantage over the others, and that such separate litigation would waste and exhaust the proceeds of this liability of stockholders, the only fund to which depositors could look for payment, and asking to have an account taken of all the liabilities of the bank, and establish the amount for which the various stockholders were liable personally, and to have the amount of the debts proven apportioned among the stockholders: *Held*, that the bill clearly showed a case for equitable relief, and gave the court jurisdiction of the subject matter. *Tunesma* v. *Schuttler*, 156.

22. The fundamental principle upon which bills of this kind are maintained, is, equality of benefit and burden among a numerous class of persons similarly situated, in respect to a particular fund. The principle that equality is equity, is one of the most fruitful sources of equity jurisdiction. Ibid. 156.

23. The liability of stockholders under section 9 of the act of 1857, entitled "An act for the formation of manufacturing, mining, mechanical and chemical corporations," is to the creditors of the corporation as a class, and not to each individual creditor. Therefore, the remedy of a creditor seeking to enforce the personal liability created by that section, is in a court of equity, and not at law. *Rounds* v. *McCormick et al.* 252.

24. *Conclusiveness of decree, both as to persons and remedies.* A decree of a court of equity fully adjudicating and settling the extent of the personal liability of all the stockholders of an insolvent corporation,

CHANCERY. STOCKHOLDER'S LIABILITY—REMEDY. *Continued.*

upon a proper bill filed for that purpose by certain creditors, for themselves and all other creditors who might come in and prove their demands, is binding and conclusive upon all creditors making themselves parties to the suit, no matter if it may be erroneous, in all collateral suits and proceedings. *Tunesma* v. *Schuttler*, 156.

25. So in this case, a bill was filed by certain creditors of an insolvent bank, in behalf of themselves and all other creditors, seeking the appointment of a receiver, etc., under which one was appointed, and an order or decree was rendered therein directing the receiver to pay to the creditors seventy per cent of the par value of their claims. After this an amended and supplemental bill was filed, making the bank and all its stockholders parties, and asking for a decree to compel the stockholders to pay a sum sufficient to discharge the balance of the debts, and the receiver filed a similar petition. During the pendency of the three last bills, a creditor of the bank, not a party to the bill by name, came in and received his dividend of seventy per cent from the receiver. The court then referred the case to the master, who, after having given notice to all persons to prove their claims, found the amount of the same, and the amount of the deficiency of the assets coming to the receiver,—which finding was approved, and the stockholders decreed to pay a certain amount which was required to satisfy all the debts in full, which was done, and the stockholders discharged from further liability: *Held*, that the final decree was binding upon such creditor who came in and received his dividend, the same as if he had been a party by name, and that such decree was a bar to any suit at law by him against a stockholder who had paid his share under the decree. Ibid. 156.

SPECIFIC PERFORMANCE.

26. *Parol gift of land by a father to his son.* In this case the facts established were considered sufficient to bring it within the rule, that where a father makes a verbal agreement with a son to convey to him a tract of land if the latter will go and live upon the same, make expenditures upon and improve it, and this is done in reliance upon the promise, a court of equity will enforce the specific performance of the agreement. *Irwin et al.* v. *Dyke et al.* 302.

27. *Verbal promise to procure title and convey land—Statute of Frauds—making improvements without possession under the contract.* A person obtained a lease of a tract of land, and put his niece in possession thereof, under a verbal promise that if he succeeded in acquiring the title thereto he would give the same to her. She made some valuable improvements on the same, but it was *held*, that as she did not enter into possession under the agreement to convey, being a mere tenant at sufferance, the Statute of Frauds, which was interposed, was a bar to a bill to compel a conveyance from the promisor. *Kaufman* v. *Cook*, 11.

28. A vendor who, for a valuable consideration, enters into a verbal contract for the sale of premises to which he has no title, and who sub-

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

sequently acquires the title, will be bound to specifically perform his contract when the purchaser has taken possession under it, and made valuable improvements thereon,—but not where he had no title when the possession was taken, and his promise was without consideration. *Kaufman* v. *Cook*, 11.

29. The possession of real estate must be taken under the contract of purchase, or agreement to give the same, to take the case out of the Statute of Frauds, and not be taken as a mere tenant. The entry must be under a binding contract, with one having title either in possession or expectancy. Ibid. 11.

30. *Where penalty for non-performance is provided.* The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform, does not prevent a court of equity from decreeing a specific performance. *Lyman* v. *Gedney*, 388.

31. It is only where the contract stipulates for one of two things in the alternative,—the performance of certain acts, or the payment of a certain amount of money in lieu thereof,—that equity will not decree a specific performance of the first alternative. Ibid. 388.

32. *When party estopped from taking advantage of a want of strict performance.* Where the vendee of land, before the time fixed for the vendor to make him a conveyance, repudiates the contract, and refuses to accept the deed tendered to him, not on account of any objection to its form or substance, he will be estopped, in equity, from setting up in defence to a bill for specific performance, that time was of the essence of the contract, and a failure to tender a sufficient deed within the required time. Ibid. 388.

33. *Tender of deed, when rendered unnecessary.* Where the purchaser of land announces his intention to the vendor not to comply with his contract before bill filed against him for a specific performance, no tender of a deed to him will be necessary; and it will be no defence that before suit the vendor tendered him one which failed to describe the premises with sufficient accuracy. Ibid. 388.

34. *Contract of mutual benefit association—jurisdiction to enforce payment of benefits promised.* A mutual benefit association, a corporation not organized for pecuniary profit, having no surplus, and relying entirely upon mortuary assessments made upon each death of a member for the payment of benefits to the beneficiaries of decedent, gave a certificate of membership to a member, in the sum of $5000, whereby it promised, upon proof of his death, that an assessment should be levied upon the surviving members to the amount of the certificate, which sum, when collected, less the expenses and collection costs, it would pay to his devisees, in case he left any, and if he left none, to his legal heirs. It was *held*, that a court of chancery might properly take jurisdiction of a bill brought by the heirs of the deceased member to

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

enforce payment of the certificate, by compelling a specific performance of the contract. *Covenant Mutual Benefit Association of Illinois* v. *Sears et al.* 108.

ALLEGATIONS AND DECREE.

35. *The allegations of the bill and the decree should correspond.* It is error to render a decree against the wife of the defendant, granting a perpetual injunction against her and her husband, where there is no allegation in the bill upon which to base any decree against her. *Parker et al.* v. *Shannon*, 192.

36. *As to matters in defence in chancery.* A defendant in a chancery suit is bound to apprise the complainant, by his answer, of the nature of the defence he intends to set up, and he can not avail himself of any matter in defence not stated in his answer, even though it may appear in the evidence. *Johnson* v. *Johnson*, 611.

RELIEF OF SURETY.

37. *Under apprehension of loss or injury.* See SURETY, 3.

TENDER.

38. *On bill to declare and enforce a trust—allegation of willingness to pay, sufficient.* See TENDER, 1.

PARTIES IN CHANCERY.

39. *On bill to enforce a trust in favor of creditors—personal representatives of a deceased creditor—heirs as representing debts due the ancestor.* See PARTIES, 1, 2.

COSTS.

40. *Proceeding to declare and enforce a trust—trust denied—costs against defendant.* See COSTS, 1.

EVIDENCE.

41. *Receiving evidence subject to objection.* See EVIDENCE, 6.

FORMER ADJUDICATION.

42. *Dismissal of bill for reasons not affecting the merits—whether a bar to a subsequent suit.* See FORMER ADJUDICATION, 1, 2.

CIRCUIT JUDGE.

POWERS OF JUDGE.

In vacation. See JUDICIAL POWER, 1.

CITY ATTORNEY.

POWERS AND DUTIES.

1. *His power in respect to an appeal.* A city attorney elected by the people, whose duty it is to look after and protect the interests of the city in all legal controversies, will have power, on behalf of the city, to pray for an appeal from a judgment against the city, and prepare the necessary steps for taking the same. All his acts within the scope of his authority will be binding on the city. *Connett* v. *City of Chicago*, 233.

CITY ATTORNEY. POWERS AND DUTIES. *Continued.*

2. *Duty in respect to suits, and presumption in respect thereto.* After having taken the necessary steps for an appeal from a judgment against the city, it is the duty of the city attorney to report the condition of the case to the city council, together with his views in respect to the propriety of taking the appeal; and in the absence of proof to the contrary, it will be presumed he has discharged his duty in such respect. *Connett* v. *City of Chicago*, 233.

3. *Validity of agreement to submit to arbitration, made by him, when not disaffirmed, or is ratified by city.* Where a city attorney, after praying for an appeal from a judgment against the city, agreed with counsel for the plaintiff to submit the question of the liability of the city to the arbitrament and decision of an arbitrator, if the city council, after the lapse of several months, made no objection to the agreement to arbitrate, and afterward availed of the decision of the referee by bringing suit to have his decision carried into effect, it was *held*, that the other party could not avoid the effect of the award on the ground of want of authority on the part of the city attorney to bind the city by his agreement. Ibid. 233.

CLOUD UPON TITLE. See CHANCERY, 17.

CONFLICT OF JURISDICTION. See JURISDICTION, 1.

CONSIDERATION.

PROMISSORY NOTE INTENDED AS A GIFT.

1. A promissory note, executed without any other consideration than that of natural affection, or one without any valuable consideration, intended as a mere gift, can not form the ground of a recovery in an action at law. *Williams* v. *Forbes, Admr.* 167.

CONSTITUTIONAL LAW.

BUILDING AND LOAN ASSOCIATION.

1. *Validity of the act of 1872—usury.* The decision of this court in *Holmes et al.* v. *Smythe et al.* 100 Ill. 413, that the act for the incorporation of loan associations is not unconstitutional, and that loans made according to its provisions are not usurious, is adhered to and followed. *Freeman et al.* v. *Ottawa Building, Homestead and Savings Association*, 182.

PUBLIC PROPERTY.

2. *Power of legislature to authorize the sale of public property—and of private rights in respect thereto.* See PUBLIC PROPERTY, 1, 2, 3.

CONSTITUTIONAL LAW. *Continued.*

MUNICIPAL AID.

3. *Not to a merely private enterprise.* See MUNICIPAL CORPORATIONS, 7, 8.

MUNICIPAL INDEBTEDNESS.

4. *Constitutional limitation.* Same title, 4, 5.

CONTEMPT.

COMMITMENT.

1. *Refusing to obey order of court to deliver certain property into the hands of a receiver—effect of mere error in the order—or where a portion of the order is void—as to duty of person so directed.* Where a court of chancery has acquired jurisdiction over the property of an insolvent corporation, and of the defendant claiming the same, its order on the defendant to assign and turn over the property claimed by him, to a receiver, for its preservation, must be obeyed, however erroneous it may be; and the fact that such order may be too broad, and require the transfer of some of the property wrongfully, will not justify the defendant in refusing to obey. *Tolman* v. *Jones et al.* 147.

2. In case of an error in the exercise of the jurisdiction of the court in the ordering of one of the defendants to assign and deliver to the receiver some property not belonging to the corporation, will not render the order void as to such property, and justify the defendant in refusing to obey the same. In such case the tests of jurisdiction as to the subject matter are the allegations of the bill, and not the proof under it. Ibid. 147.

3. But even if the order of the court is void in part in requiring the surrender of property not derived from the corporation, the remedy of the defendant is to apply to the court for a modification of the order. If he fails to pursue this remedy, and refuses to obey the order, he may be committed for a contempt of court. Ibid. 147.

4. *Rule to show cause—whether necessary, before commitment.* Where a party's refusal to make an assignment of property to a receiver in pursuance of an order of the court, is reported to the court, and he is present when the matter is considered, and makes no objection to the proceeding, and is fully heard, by himself and counsel, in the matter, and after being ordered by the court to execute the assignment refuses to do so, the court will be justified in making an order for his commitment for a contempt, without any rule on him to show cause to the contrary. Ibid. 147.

APPEAL FROM ORDER OF COMMITMENT.

5. *What is involved.* See APPEALS AND WRITS OF ERROR, 15.

CONTRACTS.

CONTRACT WITH A COUNTY.

1. *What regarded a contract.* The county board of Cook county, in July, 1877, passed this resolution: "Resolved, that the contractor on the new court house, P. J. Sexton, be and he is hereby instructed to build as much of the foundation of the dome, under the supervision of the architect, as is necessary to inclose the building, subject to the architect's valuation of the same:" *Held*, that this resolution, when accepted by Sexton, constituted a contract for the building of a portion of the foundation of the dome. *Sexton* v. *County of Cook*, 174.

2. *By whom county may be bound—delegation of authority by county board.* The county board alone has power by law to bind a county by contract. There is no such power in an architect, or a committee appointed by the board, unless it has been bestowed by the county board. But the authorized body of a municipal corporation may, by a resolution or vote, clothe its officers, or agents, or committees, with power to act for it. Ibid. 174.

3. *As to work done outside of contract.* Where a county board, by resolution, directed a party to build so much of the dome of a court house being erected as was necessary to inclose the building, under the architect's supervision, and subject to his valuation of the same, it was *held*, that the architect, under such resolution, had authority only to supervise the work directed to be done, and make a schedule of prices for the same, and that any order of the architect for work outside of the terms of the resolution was not binding on the county. Ibid. 174.

4. *Ratification by payment.* A county board, by resolution, employed a contractor to build so much of the foundation of a dome for a court house as was necessary to inclose the building, the foundation being regarded the part below the ground, and the joint committee, and architect employed to supervise, afterward ordered the contractor to fill in the wall up to the main water-table or level of the first story floor, which was done, and the work paid for, and the architect and committee then directed him to complete the work as far as the roof line of the building, a part of which was done, when further work was ordered by the board to be stopped, and payment was made for all the work which had been done under such orders: *Held*, that the payment for the work done under the orders of the committee and architect, outside of that required in the resolution, was not such a ratification of the subsequent orders made by them as to bind the county, and that the county was not liable to the person doing the work for the profits he might have made if he had not been ordered to discontinue it. Ibid. 174.

CONTRACTS CONSTRUED.

5. *Right of buyer to determine as to the quality of goods purchased and delivered.* A contract for the sawing, and delivery to the purchaser, of lumber, providing that he should measure the same when delivered,

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

and that he should measure and pay for only such as was absolutely clear, and suitable for a certain purpose, while it gives the buyer the right to measure the lumber and pass upon its quality, does not make him the sole judge, and his decision beyond review. In such case, he is bound to receive and measure such of the lumber as complies with the contract, although in his judgment it is not of the proper quality. *Mulliner* v. *Bronson*, 510.

RESCISSION OF CONTRACT.

6. *Right to rescind for refusal to comply with terms except upon new conditions.* Where a purchaser of a lot of corn to be delivered to him at a future time, agrees, as a part of the contract of sale, to make such advances from time to time as the seller may require, if the purchaser refuses to make an advance when demanded, except upon condition that the vendor shall give his note for the amount, the seller may rescind the contract, and refuse to deliver the corn. *Gilbert & Co.* v. *McGinnis et al.* 28.

AS BETWEEN PRINCIPAL AND SURETY.

7. *Created by law—principal to refund what surety has to pay.* See SURETY, 2.

LIFE INSURANCE.

8. *By-laws of mutual benefit association, as entering into the contract of insurance.* See INSURANCE, 4.

9. *Contract of mutual benefit association construed as to payee or beneficiary.* See INSURANCE, 5.

10. *Enforcement of contract in equity.* See CHANCERY, 34.

CONVEYANCES.

DEEDS OF MARRIED WOMEN.

1. *Release of dower under act of 1853—requisites of the certificate of acknowledgment.* Under the act of 1853, relating to conveyances, the certificate of the acknowledgment must show that the wife of the grantor joining with him in a deed was personally known to the officer taking the acknowledgment, or proven by a credible witness, in order to release or bar her dower. *Coburn* v. *Herrington*, 104.

A DEED CONSTRUED.

2. *As showing equitable outstanding title.* In 1851 the vendor of land made a conveyance of the same to an assignee of his three vendees, A, B and C, in which the making of the contract of sale to A, B and C, and its assignment to the grantee, were recited. It was objected, that as the assignment by one was by an attorney in fact, it was bad, because the power was not acknowledged, and because a wife of one of the vendees had an equity that did not pass by the assignment: *Held*, that as the legal title passed alone by the original vendor's deed, no acknowledgment to the power of attorney was necessary to the assignment of

CONVEYANCES. A DEED CONSTRUED. *Continued.*

the contract, and as the property had been held for thirty years, the deed must be held as sufficient to pass the title. *Lyman* v. *Gedney*, 388.

DEED FROM PARTNERSHIP FIRM.

3. *Presumption as to whether by all its members.* About forty years ago the owner of two lots conveyed them to a firm, (Cushman, Eaton & Co.) and the next deed in the chain of title was executed by W. H. Cushman and wife, Seth Eaton and wife, James M. Leonard and wife, and Benjamin Thompson and wife, to one N., but the deed did not recite that these persons constituted the firm named: *Held*, that such recital was not necessary; and it appearing Thompson was one of the firm, and no adverse claim ever having been interposed, it was also held that the proof was sufficient to show a conveyance from the firm, after the lapse of so great a time. Ibid. 388.

RESERVATION CLAUSE IN DEED.

4. *Purchaser assuming incumbrance—of the lien created thereby in favor of holder of incumbrance.* See LIENS, 1.

DELIVERY OF DEED IN ESCROW.

5. *Effect of delivery to gruntee.* See ESCROW, 1.

DESCRIPTION OF LAND IN DEED.

6. *By reference to prior deed—controlling words.* See DESCRIPTION—BOUNDARIES, 1.

7. *Parol evidence — to identify land under a misdescription in a deed.* See EVIDENCE, 4.

8. *Mistake in description of land in deed of assignee in bankruptcy—correcting as against creditors.* See CHANCERY, 18.

LEGAL TITLE TO CANAL LANDS.

9. *How passed by the State.* See CANAL LANDS, 1.

CORPORATIONS.

TWO OF THE SAME NAME.

1. *Two corporations using the same or similar names in the same business—right of prior organization to prevent the same.* A bill by a domestic corporation incorporated by the name of "Drummond Tobacco Company," to enjoin the incorporation of another company in the same city by the name of "Drummond-Randle Tobacco Company," to engage in the same business, will not be sustained unless it is shown, by such a preponderance of evidence as to satisfy the mind of the chancellor, that the incorporation of the second company under the name proposed will injure the former company in its business. *Drummond Tobacco Co.* v. *Randle et al.* 412

2. So the use of any particular name by a corporation will not be enjoined unless it is made to appear, from the evidence and by all the circumstances, the proposed use of the name will likely result in injury to the complainant. Ibid. 412.

CORPORATIONS. TWO OF THE SAME NAME. *Continued.*

3. If the persons composing a corporation formed under the laws of this State should become also incorporated under the laws of another State, the two organizations will constitute separate and distinct corporate bodies, and the one can not form an integral part of the other; and the corporation of this State can not enjoin the formation of a new corporation in this State under a similar name, to prevent an injury to the business of buying and selling of the foreign corporation in this State. *Drummond Tobacco Co.* v. *Randle et al.* 412.

4. If a domestic corporation, after its members have procured an incorporation of themselves in a sister State, by the same name, should abandon the business, practically, in this State, and keep its organization only in name, to prevent others from transacting the same business, it can not, in equity, maintain a bill to enjoin the formation of another corporation in this State by a similar name, to engage in the same business, when none of its trade-marks are sought or intended to be used by the latter. Ibid. 412.

LIABILITY OF STOCKHOLDERS.

5. *Enforcement in chancery—to the exclusion of the remedy at law.* See CHANCERY, 21, 22, 23.

6. *Conclusiveness of decree—both as to persons and remedies.* Same title, 24, 25.

CEMETERY COMPANIES.

7. *Of their corporate powers—by-laws, rules and regulations—uniformity of application required.* See CEMETERIES, 3, 4, 5.

CORPORATE POWERS.

MUNICIPAL CORPORATIONS.

General powers. See MUNICIPAL CORPORATIONS, 1, 2.

CORPORATE PURPOSE. See MUNICIPAL CORPORATIONS, 6, 7, 8.

COSTS.

IN CHANCERY.

1. *Proceeding to enforce a trust.* A party who holds the evidence of title to a lot in trust for the real owner, as a security against the payment of notes given by him for the purchase money, and denies the trust and claims to have bought the property for himself, so as to make it necessary to file a bill against him by the heirs of the original *cestui que trust*, can not complain that he is adjudged to pay part of the costs, as he might properly have been required to pay all the costs. *Powell* v. *Powell*, 329.

COUNTIES.

CANAL LANDS.

1. *Donations to and sales by counties—application of proceeds of sales.* See CANAL LANDS, 2, 3.

COUNTIES. *Continued.*

CONTRACT WITH A COUNTY.

2. *What regarded as a contract—by whom county may be bound—delegation of authority by county board.* See CONTRACTS, 1 to 4.

COUNTY BOARD.

POLLING PLACES IN TOWNS.

1. *By whom polling places may be established—prerequisites to the establishing of more than one in the same town—as to designating the places.* See ELECTIONS, 3, 4.

2. *Establishing new precincts—whether the precinct thereby becomes a town polling place.* Same title, 5.

COUNTY BUILDINGS.

CANAL LANDS.

Application of proceeds of canal lands donated to counties. See CANAL LANDS, 2, 3.

CREDITORS.

PRIORITY BETWEEN CREDITORS OF INSOLVENT.

1. *Bill for accounting between partners—receiver of firm assets—creditors obtaining priority over each other—estoppel of creditor to claim priority, inconsistent with former acts.* See RECEIVERS, 5.

CONVEYANCES TO HINDER AND DELAY.

2. *When void as to creditors of grantor—on secret trust for use of grantor—distinction as to rights of prior and subsequent creditors—of the consideration.* See FRAUDULENT CONVEYANCES, 1, 2, 3.

CRIMINAL LAW.

VENUE.

1. *What proof sufficient.* On a trial for robbery, while no witness testified directly that the offence was committed in Peoria county, but the evidence showed that it was committed on W. street, in Peoria, Illinois, it was *held*, that this was sufficient to show the offence was committed in Peoria county, Illinois. *Sullivan* v. *The People*, 24.

LARCENY.

2. *Failure of constable to pay over money collected on execution.* A constable who collects money on an execution, and fails to pay the same to the party entitled thereto, is not liable to indictment and conviction for larceny under section 74 of the Criminal Code, but he may be fined under section 79. *Stoker* v. *The People*, 320.

WHETHER MURDER OR MANSLAUGHTER.

3. *As to the grade of the offence—the jury to determine, not the court.* Under an indictment for murder the accused may be found guilty

CRIMINAL LAW. WHETHER MURDER OR MANSLAUGHTER. *Continued.*

of manslaughter, and the instructions in such a case should leave the jury free to find whether he is guilty of murder or manslaughter. Therefore, an instruction that if the jury shall believe, from the evidence, certain facts, they should find the defendant guilty of murder, is erroneous. It should direct no more than to find him guilty. *Panton* v. *The People*, 505.

VOLUNTARY OR INVOLUNTARY MANSLAUGHTER.

4. *Instructions—defining the various grades of the offence.* On the trial of one for murder, where the evidence clearly showed the homicide was either murder or voluntary manslaughter, an instruction defining voluntary manslaughter need not also define involuntary manslaughter. To do so would be to call the attention of the jury to a principle of law not applicable to the facts, and would tend to confuse rather than enlighten them as to the real issue. *Davis* v. *The People*, 86.

5. An instruction in such case, telling the jury that they must believe, from the evidence, that the killing "was done in sudden heat of passion apparently sufficient to make the passion irresistible," to make it manslaughter, is not subject to the objection that it requires the defendant to show the existence of a passion absolutely irresistible, to reduce the killing to manslaughter; and it is not faulty in failing to state the law of self-defence, when that is stated in other instructions. Ibid. 86.

SELF-DEFENCE.

6. *Whether the danger real or only apparent.* If a person assaulted in such a manner and under such circumstances as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life or suffering great bodily harm, acts under such belief, he will be justified in defending himself, whether the danger is real or only apparent. *Panton* v. *The People*, 505.

REASONABLE DOUBT.

7. *As to the guilt of the accused on the whole evidence.* The law does not require that the jury shall believe that every fact in a criminal case has been proved beyond a reasonable doubt, before they can find the accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case. *Davis* v. *The People*, 86.

EVIDENCE IN CRIMINAL CASES.

8. *In case of homicide—proof of character of deceased as a peaceable man, and the contrary.* Where a defendant on trial for the murder of his brother proved that the deceased was regarded as a "good man in a fight," and many other things that tended to show his character as a quick-tempered, violent and rash man, it was *held*, that there was no error in allowing the prosecution, in rebuttal, to prove the character of the deceased as a peaceable man. Ibid. 86.

CRIMINAL LAW. EVIDENCE IN CRIMINAL CASES. *Continued.*

9. *Treatment of deceased by defendant.* In the same case it was held that evidence of the manner in which the defendant had previously treated the deceased, being wholly immaterial, was properly excluded. *Davis* v. *The People*, 86.

ACCUSED AS A WITNESS.

10. *In his own behalf—of the consideration to be given to his testimony—tests of credibility, etc.* On the trial of two persons on the charge of robbery, two witnesses testified in behalf of the prosecution, and the two defendants testified in their own behalf, the four being present at the time of the alleged robbery. The court instructed the jury, as to each defendant, "that while the defendant is by law a competent witness in his own behalf, yet his credibility, and the weight to be given to his testimony, are matters exclusively for the jury to pass upon; and while they should not disregard his testimony through mere caprice, yet the jury are not bound to believe him, nor are they bound to treat his testimony the same as the testimony of other witnesses, but they may take into consideration the fact that he is the defendant, and his interest in the result of the case, as such, and give his testimony such weight as, under all the facts and circumstances in evidence in the case, they may think it is entitled to:" *Held*, that the instruction was erroneous in telling the jury they were under no obligation to treat the defendant's evidence the same as the testimony of other witnesses. *Sullivan* v. *The People*, 24.

11. In a criminal prosecution, the accused, as a witness in his own behalf, differs from other witnesses only in the fact that he is the defendant, charged and being tried for crime, which may be taken into consideration by the jury in passing on his credibility. But his testimony must be treated the same as any other witness. Ibid. 24.

12. In such case, the interest of the accused in the matter of the prosecution, and his desire to shield himself from punishment, may properly be considered by the jury in passing upon his credibility, and his evidence may be subjected to all the tests resorted to in order to elicit truth from an unwilling witness; but where the evidence has undergone all these tests, then it is to be treated the same as the evidence of other witnesses. Ibid. 24.

MUNICIPAL CORPORATIONS.

13. *Concurrent powers of municipal authorities and of the State.* See MUNICIPAL CORPORATIONS, 13.

CUSTOM—USAGE.

AS CONTROLLING CONTRACTS.

1. *How far admissible to explain or vary terms of contract.* Where a commercial contract is in any respect ambiguous, a particular custom or usage of trade known to the parties, or which, under the circum-

CUSTOM—USAGE. As CONTROLLING CONTRACTS. *Continued.*

stances, they are presumed to know, or any previous course of dealing between them that will have a tendency to disclose the real intention of the parties, and to aid the court in arriving at the true construction of the contract, is admissible in evidence. *Gilbert & Co.* v. *McGinnis et al.* 28.

2. Evidence of a particular custom or usage of trade is also admissible, for the purpose of engrafting, as it were, new terms into a contract, subject, however, to the qualification that such terms are not expressly or impliedly excluded by the express agreement. To have this effect the custom or usage must be reasonable, and not in conflict with any general rule of law. Ibid. 28.

3. But it is not admissible to prove a custom or usage the effect of which will be to add to an express agreement a condition or limitation which is repugnant to or inconsistent with the agreement itself. Such evidence is never admitted to vary or contradict, either expressly or by implication, the terms of an agreement, written or verbal. Ibid. 28.

4. In February a person agreed to sell to another a quantity of corn at a stipulated price per bushel, to be delivered in the months of August and September following, and the purchaser, as a part of the same agreement, promised to make advances on the contract to the seller of what money he might, from time to time, require. It was *held*, in a suit upon the contract brought by the purchaser for non-delivery of the corn, that evidence that a custom or usage prevailed requiring the vendor to give to the vendee his note upon receiving any such advances, was not admissible in behalf of the plaintiff, as it was inconsistent with the express contract. Ibid. 28.

BANKING.

5. *Of the authority of a cashier to bind the bank—custom of banks to borrow money.* See BANKS AND BANKING, 6.

OF RAILWAY COMPANIES.

6. *What is negligence, as between master and servant—custom at other places as to mode of handling railroad cars, and as to watchfulness of railroad laborers loading and unloading cars.* See MASTER AND SERVANT, 5.

DAMAGES.

EXCESSIVE DAMAGES.

1. *On appeal from Appellate Court—reviewing facts in Supreme Court.* See APPEALS AND WRITS OF ERROR, 8.

UNLIQUIDATED DAMAGES.

2. *Setting off against a judgment—when denied by court of equity.* See CHANCERY, 4.

DEATH.

OF ABSENT PERSON.

1. *Presumption from long continued absence—evidence.* Mere rumor, however, that an absent party not heard from for several years, is dead or living, is not admissible in evidence, either to aid or rebut the presumption of his life or death at a particular time after he was last heard from. *Johnson* v. *Johnson*, 611.

2. Seven years must elapse before the presumption of death arises. After that length of time death is presumed; but there is no presumption that the life continued through the entire period, or that it was not extinguished at any particular time within it. Ibid. 611.

3. A jury may find the fact of the death of a party from the lapse of a much shorter period than seven years unheard from, when the circumstances of the case raise the presumption of death. The age, state of health and habits of the absent party, and many other circumstances, may be shown to aid or rebut the presumption of the continuance of life. Ibid. 611.

DECREE.

SALE OF LANDS TO PAY DEBTS.

Of its requisites, and the measure of relief it may give. See ADMINISTRATION OF ESTATES, 7, 8, 9.

DEDICATION.

FOR A PUBLIC SQUARE.

1. *By plat of a town.* A plat of a town laid out under the law of 1833 not having been acknowledged as required by that law, which shows a block marked "public square," was held not to have passed or conveyed any title to the public. *Lyman* v. *Gedney*, 388.

DELIVERY.

OF DEED IN ESCROW.

Effect of delivery to grantee. See ESCROW, 1.

DESCENT OF PROPERTY.

ADVANCEMENT.

By father to son—death of son in lifetime of father—rights of children of the son—statute of 1872 construed. See ADVANCEMENT, 1, 2.

DESCRIPTION—BOUNDARIES.

DESCRIPTION OF LAND IN DEED.

1. *Description of land—by reference to prior deed.* A contract for the sale of real estate, after attempting to describe a part of the lot, contained the following clause: "Also a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece

DESCRIPTION—BOUNDARIES.

DESCRIPTION OF LAND IN DEED. *Continued.*

of ground described in the deed to the party of the first part," which described the land properly: *Held*, that in so far as the contract referred to the deed to the vendor, and in effect adopted the description therein, no rectification of the contract was necessary. *Lyman* v. *Gedney*, 388.

2. *Evidence for purpose of rectifying a contract for mistake.* Where a mistake occurs in the description of land in a written contract of sale, a prior instrument written in pencil, evidencing the contract, is competent evidence to show the mistake in the more full and formal agreement afterwards entered into. Ibid. 388.

3. *Controlling words.* An agreement in pencil, for the sale and exchange of real estate, described the land that one party was to convey to the other, as the "N. ½ of the N. ½ of lot No. 2, in block 11, * * * and a piece of ground 10 by 40 in rear thereof, on following terms, (namely, known as the Cook & Glover block:)" *Held*, that the words, "Cook & Glover block," were the controlling descriptive words, that the block was a fixed and permanent monument, and that any words repugnant to such description were to be rejected. Ibid. 388.

4. *Parol evidence—to identify land under a misdescription in a deed.* See EVIDENCE, 4.

DISCRETION.

PROBATE OF WILL.

Discretion of court as to the time of hearing proof of will. See WILLS, 3; MANDAMUS, 5.

DIVORCE AND ALIMONY.

CASE OF VOID MARRIAGE.

1. *Former husband living.* A decree of divorce can not be had by the wife on the ground of desertion, if the complainant, at the time of the alleged marriage in respect of which the divorce is sought, had a husband then living, and the prior marriage had not been dissolved by divorce, although the former husband may have deserted her and had not been heard of by her for six years before her second marriage. In such case the second marriage is a nullity. *Johnson* v. *Johnson*, 611.

ALIMONY.

2. *Whether by annual allowance, or land in fee.* Under the decisions of this court the practice has been, unless for special reasons,—as, where the property has been bought with the wife's money, or where the proof shows the property has been accumulated by the personal labor of the wife,—to give her an annual allowance or life estate in the real property of the husband, to be held under the control of the court, and not to give her the fee to the husband's real estate as alimony, on a decree of divorce. *Shaw* v. *Shaw*, 586.

DIVORCE AND ALIMONY. *Continued.*

RIGHT OF HOMESTEAD.

3. *Effect of a divorce at the suit of the wife, as to her homestead right.* See HOMESTEAD, 1, 2.

PRACTICE.

4. *Striking defendant's answer from the files—in suit for divorce.* See CHANCERY, 15.

DOWER.

IN CASE OF TWO WIDOWS.

1. *And a divorced wife.* Where a son takes land by descent from his father, subject to the dower of his mother in the same, and her dower is afterward assigned to her, such assignment will relate back to the time of the death of the father, so as to prevent the seizin of the son as of a present estate in the third of the premises assigned to the widow of the father; and the legal effect is to deprive the widow of the son, who dies in the lifetime of his mother, of dower even in the reversion of the third of the estate assigned. *Stahl* v. *Stahl et al.* 375.

2. But the rule is different where the father *conveys* to the son. In such case the son becomes seized of a present estate in the whole of the premises, subject only to the contingent dower right of his mother in one-third thereof, if she survives the grantor, so that upon the death of such grantee during the life of the widow of the grantor, the wife of such grantee is entitled to dower in the whole premises, subject only to the incumbrance of the prior right of dower in one-third of that estate during the actual continuance of that right. Ibid. 375.

3. So, applying these rules to the present case, where a husband, seized of the fee in land subject to the contingent right of dower in a former wife, who had procured a divorce for his fault, marries again, and dies leaving both the divorced wife and the second wife living, the former will take dower in one-third of the whole, unincumbered, and the latter will be entitled to dower in the whole premises, subject to the incumbrance of the first wife's prior right of dower during the continuance of that right. Ibid. 375.

ASSIGNMENT OF DOWER—EVIDENCE.

4. *Effect of a subsequent deed to same grantee for other lands.* Where the certificate of the acknowledgment of a deed made by a husband and wife, of a tract of land, is invalid as to the wife, so that the deed fails to release her dower in the premises, a subsequent deed made by her to the same grantee, for other real estate, is not admissible in evidence against her in a suit by her for the assignment of her dower in the first named tract. *Coburn* v. *Herrington*, 104.

5. *Lands held in severalty—against whom the dowress may proceed.* Where land in which a widow is entitled to dower, has been divided, by partition, between several different parties, she may properly bring a

DOWER. ASSIGNMENT OF DOWER—EVIDENCE. *Continued.*

separate suit against the owner of each portion. She may, perhaps, proceed against all in one suit, but she is not compelled to do so. *Coburn* v. *Herrington*, 104.

RELEASE OF DOWER.

6. *Where deed becomes inoperative to pass principal estate—effect upon the release of dower.* Where a deed from a husband and wife becomes inoperative as to the husband's estate by reason of a sale under a prior judgment lien, or for other cause, it will also become inoperative as to a release of dower therein by the wife, and she may assert the right after the death of her husband. *Stowe* v. *Steele*, 382.

7. *Dower unreleased—no objection to title after dowress' death.* It was objected to a vendor's title to land, that the wives of two former owners failed to relinquish their dower; but it was *held*, that proof of their death prior to the sale obviated such objection; and so proof of the death of the husband of another dowress thirty years before, was held sufficient to show her dower was barred, and hence no incumbrance. *Lyman* v. *Gedney*, 388.

8. *Requisites of certificate of acknowledgment under act of 1853.* See CONVEYANCES, 1.

IN CASE OF DIVORCE.

9. *Effect of a divorce at the suit of the wife and for the husband's fault, as to her right of dower.* See HOMESTEAD, 1, 2.

LIMITATIONS.

10. *Laches—lapse of time—as a bar to dower right.* See LIMITATIONS, 8, 9.

PAYMENT OF TAXES.

11. *Duty of dowress as to the payment of taxes—effect of non-payment as working a forfeiture, as for waste.* While the party holding the title to land in which a widow is entitled to dower, is in possession, or receiving the income from the estate, the dowress is under no obligation or duty to pay the taxes on the same. *Stowe* v. *Steele*, 382.

12. So dower will not be forfeited by the failure of the dowress to pay the taxes on the premises, and allowing them to be sold therefor, before they are in fact assigned to her and she is put in possession. Ibid. 382.

13. If back taxes on land out of which dower is sought, are taken into consideration and adjudicated in the proceeding for the assignment of dower, in fixing the damages the demandant is entitled to for the detention of her dower, the reversioner, having had the benefit in that way of all the taxes paid by her, can not be heard to insist that the non-payment of such taxes at the proper time worked such waste as to bar her dower under the statute. Ibid. 382.

EASEMENTS.

RESERVATION BY GRANTOR.

Erection of building thereon—bill to enjoin—whether freehold involved. See APPEALS AND WRITS OF ERROR, 13.

EJECTMENT.

TITLE DERIVED FROM COMMON SOURCE.

1. In actions of ejectment, where both parties claim from a common source of title, the plaintiff will only be required to show a good and connected chain of title from the common source down to himself, to entitle him to recover. If the plaintiff shows the better title, though not altogether free from objections, he will be entitled to recover, unless a paramount outstanding title is shown in another. *Smith et al.* v. *Laatsch et al.* 271.

2. Where the defendant files an affidavit denying that he claims title from the same source as the plaintiff, the latter may show that he does so claim, by introducing in evidence the various deeds connecting him with such alleged common source; and it is no objection to the exercise of this right that the evidence offered also proves the defendant's title to be worthless. If the defendant does not deny claiming under the source named, the plaintiff need not prove that fact. Ibid. 271.

3. It was not the purpose of the legislature, in adopting the 25th section of the Ejectment act of 1872, to hold the plaintiff absolutely bound by the denial of the defendant that the parties claimed from a common source, where a counter-affidavit is filed, and thereby cut off his common law right to show that the two chains of title did run back to a common source. The sole purpose of that section was to relieve the plaintiff, in cases of this kind, from the burden of proving the defendant's chain of title as well as his own, unless the defendant should deny, by counter-affidavit, that he claimed from the alleged common source, in which event the burden would still remain upon the plaintiff, just as it did before, of proving both chains of title, running back to a common source. Ibid. 271.

4. In this case the plaintiffs filed an affidavit that they and defendants claimed title under a common source,—the father of the plaintiffs. The defendants denied this fact, and stated that they claimed under a deed from A B to C D, and a deed from the latter, the defendants' deceased father. Plaintiffs, after proving their heirship, introduced in evidence a deed from the administrator of their father's estate, under a decree of the county court, to J. G., and a deed from him to A B, and a deed from A B to C D, and from C D to the defendant's father, made before his death, and also showed from the record that the administrator's sale and deed were void for want of jurisdiction in the court ordering the sale. This being all the evidence, the court found for the defendants: *Held*, that the plaintiffs were entitled to recover, and that the court erred in its finding and judgment. Ibid. 271.

ELECTIONS.

TOWN ELECTIONS—NUMBER OF PRECINCTS.

1. While under the general Election law, for other purposes, there may be several *precincts* in a township, yet for the purpose of a town election, merely, there can be but one precinct, which is co-extensive with the boundary of the town. *Williams et al.* v. *Potter et al.* 628.

OF SEVERAL POLLING PLACES.

2. *For town purposes.* While for annual town elections the whole town constitutes but one precinct, yet under certain circumstances there may be several polls or voting places where votes may be lawfully received in the same town. But they must all be regarded as constituting one precinct, and each polling place is open to all voters of the town alike, subject, only, to the limitation that no one shall vote at more than one place. Ibid. 628.

POLLING PLACES—BY WHOM ESTABLISHED.

3. *Prerequisites to the establishing of more than one in the same town—as to designating the places.* The township authorities have no power to establish their polling places where more than one is required. That can only be done by the county board, and it can not establish more than one, except where it appears from the last preceding general election the number of voters in the township exceeded three hundred, and their order creating an additional polling place must designate the place where it is to be held. Ibid. 628.

4. In this case a petition was presented to the county board, setting forth that there was but one election precinct in a town, and that a large number of the voters of the town resided and worked south and east of a certain river, who were not able to bear the expense of transportation across the river to the then existing precinct, and that the public interest required there should be two precincts in the town, and prayed for a new one to be established for all voters south and east of the river. This petition was referred to a committee, who reported recommending that the prayer thereof be granted, and the report, on motion, was adopted. No place for holding the polls was designated and no further action taken, and it did not appear that over three hundred votes had been cast in the town at the preceding general election. The town clerk, in giving notice of the succeeding annual town election, named a school house in district No. 9, as the place for holding the election in the territory south and east of the river: *Held*, that the school house named was not designated by the county board as a polling place, and that votes cast at such place could not be counted, they being cast at a place unauthorized by law. Ibid. 628.

ESTABLISHING A NEW PRECINCT.

5. *Whether the precinct thereby becomes a town polling place.* The county board has ample authority to make additional precincts in a town, for general election purposes, whenever it thinks the public convenience

ELECTIONS. ESTABLISHING A NEW PRECINCT. *Continued.*

so demands, without regard to the number of the voters in the town. But the establishment of such new precinct will not make it an additional poll for receiving votes at town meetings unless the county board shall so designate it, and fix the place at which the polls shall be held. *Williams et al.* v. *Potter et al.* 628.

CANVASSING VOTES.

6. *As to town elections, and elections under the general Election law.* In the canvassing and returning of votes under the general Election law, each precinct is wholly independent of the others, and makes its own returns directly to the county clerk, while, in the case of mere polling places for town elections, after the close of the polls, the ballot boxes of the subordinate polls are taken to the chief polling place, where the town clerk officiates, and they are all then opened and canvassed, the same as if the ballots had all been deposited in one box. Ibid. 628.

ERROR.

WHEN OBVIATED.

1. *Evidence rejected being afterward received.* Error can not be predicated on the refusal to allow a question to be answered by a witness when the witness afterward testifies to the same fact sought to be established by the question. *Gordon et al.* v. *Reynolds*, 118.

2. *By the answer to the question ruled out.* The refusal of a proper question can not be assigned as error when the witness, notwithstanding the ruling of the court, substantially answers the same. *Crain et al.* v. *First National Bank of Jacksonville*, 516.

ESCROW.

DELIVERY OF DEED TO GRANTEE.

1. *Effect of delivery.* There can not be a delivery of a deed to the grantee *in escrow*. Such delivery makes the deed an absolute one to the grantee. *Stevenson* v. *Crapnell et al.* 19.

ESTOPPEL.

BY SILENCE.

1. *Owner of property failing to assert his rights.* It is a principle of general application that when the owner of property, real or personal, sees another having no right, or a limited right thereto, about to sell it absolutely to an innocent purchaser, he must speak and assert his ownership, otherwise he will be estopped from setting up his title against such purchaser, or one claiming through him. *Harding* v. *LeMoyne et al.* 65.

HIGHWAYS.

2. *Appeal from commissioners of highways—laying out, etc., road—to three supervisors—estoppel to deny legal existence of highway—by joining in appeal, etc.* See HIGHWAYS, 6.

ESTOPPEL. *Continued.*

PRIORITY BETWEEN CREDITORS OF INSOLVENT.

3. *Estoppel of creditor to claim priority, inconsistent with former acts.* See RECEIVERS, 5.

SPECIFIC PERFORMANCE.

4. *When a party is estopped from taking advantage of a want of strict performance.* See CHANCERY, 32.

EVIDENCE.

JUDICIAL NOTICE.

1. *Of the charter of a village.* The courts will take judicial notice of the provisions of a special charter of a village in this State, when such charter is declared to be a public act. *Gormley* v. *Day*, 185.

PAROL EVIDENCE.

2. *To change terms of written agreement.* The general rule that parol evidence is not admissible to change the terms of a written contract, has its exceptions, as, in respect to the consideration expressed in notes and conveyances. Such evidence is also admissible where usury is pleaded, regardless of the form the transaction may have in the writings executed by the parties. *Kidder* v. *Vandersloot*, 133.

3. *To explain latent ambiguities, and identify premises conveyed.* There is no doubt but that latent ambiguities in the description of premises in deeds, etc., may be explained by parol evidence, and that such evidence may be resorted to for the purpose of identifying the premises and applying the calls of the deed, in suits for the rectification and specific performance, and in other proceedings affecting title. *Lyman* v. *Gedney*, 388.

4. *To identify land under a misdescription in a deed.* A deed of an assignee in bankruptcy described the property as lot 9, block 28, Fort Dearborn addition to the city of Chicago, subject to all incumbrances thereon, when there was, in fact, no such lot in existence. The description was sought to be aided by parol evidence of the knowledge and intention of the assignee and the purchaser, and make the same apply to lot 28, block 9, etc.,—the proper description: *Held*, that there was no latent ambiguity, and that parol evidence could not render the deed operative to pass the bankrupt's title, which still remained in the assignee. *Ritchie et al.* v. *Pease*, 353.

5. Where land is described by an impossible description, and also as the property of a person named, in a given locality, the first part of the description may be rejected, and parol evidence received to show what property answers the latter description. Ibid. 353.

6. Where a deed purports to convey all of a person's right, title, interest or claim in a piece of property, which, from the terms used to describe it, can have no existence, it can not be regarded as an assertion

EVIDENCE. PAROL EVIDENCE. *Continued.*

of ownership of any specific property, and can not be aided by parol evidence. *Ritchie et al.* v. *Pease*, 353.

7. *Character and sufficiency of evidence to show land was bought for another.* See TRUSTS AND TRUSTEES, 1, 2.

ADMISSIONS.

8. *Availing of statements that are favorable, and rejecting such as are not.* A party may rely on admissions made by the other party, in his testimony, against his interest, without being concluded by other statements made in exoneration of his liability, or in his favor. The statements of a party made against his interest may be accepted and acted upon by the jury as true, while others made in his favor, though at the same time and as part of the same conversation, may be rejected. *Schmidt* v. *Pfau*, 494.

AS TO FACTS CONCEDED OR NOT DISPUTED.

9. *And as to a fact already proven.* There is no error in refusing to admit evidence to prove any fact which is not disputed, but is conceded on the trial; nor is there any error in refusing to admit evidence which does not tend to prove the fact sought to be established by it. *Larminie* v. *Carley*, 196.

10. Nor is there error in permitting a party to prove a fact not disputed, or to prove the same fact twice, where it works the other party no injury. *Covenant Mutual Benefit Association of Illinois* v. *Spies et al.* 463.

11. So on the trial of a suit for divorce, the complainant testified to the fact of a former marriage with another man who had not been heard from for six years before her marriage with the defendant, and it was *held*, no error to refuse in evidence the certificate of her former marriage to prove the same fact. *Johnson* v. *Johnson*, 611.

FORM OF QUESTION.

12. *Whether assuming the existence of particular facts.* On an issue as to the joint liability of two defendants as partners, one of them testified quite fully as to their withdrawal from the firm, and to the fact of having given the plaintiff both general and special notice of such withdrawal before the credit was given to the partners left after such withdrawal, who continued the firm name, and he was then asked what other steps he took to notify the parties with whom the old firm had been dealing, of the dissolution of the firm: *Held*, that the question was objectionable, as assuming that some other steps than those mentioned had been taken. *Meyer et al.* v. *Krohn et al.* 574.

AFFIRMATIVE AND NEGATIVE TESTIMONY.

13. *Want of recollection in one witness as against the affirmative testimony of another.* The statement of a witness that he does not remember having a certain alleged conversation with another, will not be regarded as a contradiction of the affirmative testimony of the latter that such conversation was had. *Vanpelt* v. *Hutchinson et al.* 435.

EVIDENCE. *Continued.*

AS TO CONVERSATIONS.

14. *Excluding part of a conversation.* In a suit against a railway company to recover for an injury by a passing train at a street crossing, the court admitted in evidence what a witness at the time said to the defendant's flagman in giving him, as the witness said, "quite a little talking to," and then excluded the flagman's reply that "the boy was hitching," it being contended that he was injured in attempting unlawfully to climb upon one of the cars while in motion: *Held*, that after admitting what the witness said to the flagman, it was error to exclude his reply. *Chicago, Rock Island and Pacific Ry. Co. et al.* v. *Eininger*, 79.

CREDITOR'S BILL.

15. *As to acts of debtor.* On the hearing of a bill to subject property conveyed by a judgment debtor to his son, to the satisfaction of the judgment, there is no error in refusing evidence offered by the son to show acts of the debtor done in furtherance of the rights of the creditor, and to aid him in the suit. *Gordon et al.* v. *Reynolds*, 118.

IN CHANCERY.

16. *Receiving evidence subject to objections.* As a general rule, the better practice in chancery cases is to receive evidence subject to such objections as may be taken to it, to be considered on the final hearing, when the court will disregard it, if incompetent, or if competent, give it such weight as it may be entitled to. In such case it will be presumed that the court considered only competent and relevant evidence. Ibid. 118.

RELEVANCY AND ADMISSIBILITY--GENERALLY.

17. *As to communications between parties prior to the transaction in controversy.* In a suit against a commission man, to recover back margins put up from time to time on a purchase for future delivery, on the ground that the defendant closed out the deal contrary to the contract, there being no complaint that plaintiff had failed to advance the requisite margins prior to the day the deal was closed out, it was *held*, that proof of telegrams from the defendant to his agent prior to that day, and communicated to the plaintiff, was irrelevant, and that there was no error in refusing to admit the same. *Larminie* v. *Carley*, 196.

18. Where a plaintiff's right of action depends upon the fact whether, on a particular day, he had failed to make a further advance to one who had made a purchase for him on the board of trade, on notice on that day, there being no claim of any default prior to such time, evidence consisting of communications from the defendant to his agent, by letters and telegrams, long prior thereto, is immaterial, and properly rejected. Ibid. 196.

19. *In suit to recover for services in the management of a business—mismanagement on the part of the agent as a defence.* In a suit to recover compensation for services as manager of a foundry and machine

shop, in which the defence sought to recoup damages resulting from the alleged neglect of duty and mismanagement of the business on the part of plaintiff, producing a failure in the business, the plaintiff, in his testimony, incidentally stated as his opinion that the business was terminated because of his refusal to work for $300 a year. On cross-examination he was asked if the true reason of the closing of the business was not because the firm had lost money from the beginning to the end, which the court, on objection, refused to allow: *Held*, no error in refusing to allow the question to be answered, as the subject matter of the inquiry could not have had any legitimate bearing upon the real issue in the case. *Schmidt* v. *Pfau*, 494.

20. *As to the manner of showing mismanagement by the agent in such case.* On an issue as to the plaintiff's right to recover for services as general manager of defendants' business in the carrying on of a foundry and machine shop, in which damages are sought to be recouped for mismanagement and neglect of duty on the part of the plaintiff, the burden of proof to establish the defence is upon the defendants, and the particular acts of misconduct or omissions of duty should be specifically pointed out, so as to enable the plaintiff to meet the same by direct proof. Evidence of the reputation of the work done is not admissible to establish such defence, as it might arise from other causes not attributable to the plaintiff. Ibid. 494.

21. *Opinions of witnesses.* In such case, it is not proper to allow one of the defendants, as a witness, to give his opinion as to the effects of the plaintiff's management upon the profits and losses of the firm during the time he controlled its affairs. Ibid. 494.

22. *Improper keeping of books of account—how to be shown.* For the purpose of showing that a plaintiff suing for wages had improperly kept defendants' books, they produced an exhibit made by the plaintiff of the partnership accounts, and asked an accountant who had examined the books, this question: "Mr. S., I place in your hands a statement, and I will ask you how that statement corresponds with the result of your examination of the books as to the indebtedness, or the amount of money these partners of the Ætna Iron Works put in the business:" *Held*, that the question was improper, both in form and substance. The proper mode of proving an improper keeping of the books of a firm by its bookkeeper, is to ask the witness whether, upon his examination of the same, he found any errors, and if so, to state what they were. Ibid. 494.

23. *In case of agreement for division of property between husband and wife—subsequent claim of alimony by the latter.* Where persons living together as husband and wife, separated, and agreed, in writing, for the division of their property, real and personal, in which contract the wife, upon receiving her portion, was to release the husband from all further claims for dower, it was *held*, on bill by the wife for the spe-

EVIDENCE. RELEVANCY AND ADMISSIBILITY—GENERALLY. *Continued.*

cific performance of the agreement and for partition, that proof offered by the defendant to show that the wife defended a suit brought by him for divorce, and claimed alimony, was properly rejected as irrelevant. *McDowell* v. *McDowell*, 255.

24. *As between vendor and purchaser—as to the quality of lumber delivered.* In a suit upon a contract for the sawing and delivery of lumber to the defendant at his yard in a city, containing a clause that defendant should measure the same after its delivery, and only such as was absolutely clear and would work into tobacco boxes, there is no error in admitting the testimony of witnesses who saw the lumber after it was sawed, in the timber, and when it was being shipped, to show its quality when delivered. If injured while being shipped, such fact might be shown. *Mulliner* v. *Bronson*, 510.

CROSS-EXAMINATION.

25. *As to matter not germain to evidence in chief.* In an action against a firm for services as manager and book-keeper, the plaintiff's father, who was a member of the firm, in testifying on behalf of the plaintiff, stated that the latter spent most of his time in the employment of the firm. On cross-examination the witness was asked if he thought during the year 1877 his and his son's profits in another business distinct from that of the defendant firm, or the witness' share of the profits therein, amounted to $2000, the object being to show that the business of the witness, in which the plaintiff had an interest, was profitable, while that of the defendants was not,—leaving the jury to infer that the plaintiff fostered the business of himself and father to the neglect of that of the defendants: *Held*, that the question was not proper on cross-examination, and if allowable at all, was matter in chief. *Schmidt* v. *Pfau*, 494.

BANK OFFICERS—THEIR POWERS.

26. *A paper given to a third party containing the signatures of those authorized to bind the defendant bank—as evidence of their authority.* See BANKS AND BANKING, 7.

27. *Prior fraudulent acts of cashier with others, not admissible.* Same title, 8.

TAX DEED.

28. *Of what it affords prima facie evidence—how rebutted.* See TAXATION AND TAX TITLES, 6, 7.

RESULTING TRUST.

29. *Evidence to establish after great lapse of time.* See TRUSTS AND TRUSTEES, 8.

SWORN ANSWER IN CHANCERY.

30. *Effect of testimony of defendant in its support, as to the weight of evidence to overcome the answer.* See CHANCERY, 13, 14.

EVIDENCE. *Continued.*

REFORMING CONTRACT.

31. *Description of land—evidence for the purpose of rectifying contract for mistake.* See DESCRIPTION—BOUNDARIES, 2.

DEGREE OF PROOF REQUIRED.

32. *Of plaintiff in ejectment—title derived from common source.* See EJECTMENT, 1 to 4.

AGENCY.

33. *Payment of premium to insurance broker—liability of insurance company a question of agency—evidence in respect thereto.* See INSURANCE, 8, 9.

OF CUSTOM OR USAGE.

34. *How far admissible to explain or vary terms of contract.* See CUSTOM—USAGE, 1 to 4.

IMPEACHMENT OF WITNESS.

35. *Proof of inconsistent statements—time for offering impeaching evidence—discretion.* See WITNESSES, 7, 8.

BURDEN OF PROOF.

36. *Necessity of having authority to enter upon premises to open highway.* See HIGHWAYS, 7.

37. *In respect to the validity of a marriage.* See MARRIAGE, 1.

38. *On claim of negligence of master in retaining incompetent servant.* See MASTER AND SERVANT, 10.

EVIDENCE IN CRIMINAL CASES. See CRIMINAL LAW, 8, 9.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

NECESSITY THEREFOR.

1. *Requisites of the bill of exceptions.* The rule in this State is inflexible that in order to take advantage of any improper ruling of the court, pending the trial of a cause, which does not relate to the pleadings or does not appear on the face of the judgment itself, the bill of exceptions must show an exception was taken to the same. It is not sufficient that the clerk recites in the record that exception was taken. Joinder in error and submitting the cause are not a waiver of defect in this respect. *Martin et al.* v. *Foulke et al.* 206.

2. Where a cause is tried by the court without a jury, and no exception is taken to the finding of the court or to the rendering of judgment, and preserved in a bill of exceptions, and no motion is made for a new trial, the finding and judgment can not be assigned for error. Ibid. 206.

3. *In case of remarks of the trial judge, claimed to have been improper.* After a cause had been reversed for misconstruction of a contract, and on the second trial the court remarked, in the hearing of the jury, without anything to call for the same, that he had not changed

EXCEPTIONS AND BILLS OF EXCEPTIONS.

NECESSITY THEREFOR. *Continued.*

his opinion as to the proper construction of the contract, but that the Appellate Court had decided the question and the court was bound to follow the decision, but no exception was taken to such remark, it was *held*, that the defendant, by failing to except thereto, waived all objection that might have been made to what was said by the court. *Mulliner* v. *Bronson*, 510.

EXECUTION.

PROPERTY IN HANDS OF RECEIVER.

Not subject to execution. See LIENS, 2.

FALSE REPRESENTATIONS. See FRAUD, 1.

FELLOW-SERVANTS. See MASTER AND SERVANT, 7 to 10.

FLAGMEN.

AT STREET CROSSING.

Duty of railway to keep a flagman at a street crossing—as to persons not crossing, but walking along the railroad track. See NEGLIGENCE, 1, 2.

FORFEITURE.

AGENT'S COMMISSIONS.

Acts of agent that will effect forfeiture. See AGENCY, 5.

FORMER ADJUDICATION.

DISMISSAL OF BILL IN CHANCERY.

1. *For reasons not affecting the merits—whether a bar to a subsequent suit.* The dismissal of a bill in chancery because of a defect therein, such as a failure to allege a matter essential to the jurisdiction of the court, is no bar to a second bill in which such defect is cured or obviated by further and sufficient allegations. *Gage* v. *Ewing*, 15.

2. Thus, where the owner of land filed a bill to set aside a tax title as a cloud on his title, which failed to show that the land was in the possession of the complainant, or was unimproved and unoccupied, so as to give a court of equity jurisdiction, its dismissal by the court is no bar to a second bill brought for the same purpose by a purchaser of the complainant in the former bill, purchasing during its pendency, which alleges that the premises are vacant and unoccupied. Ibid. 15.

SPECIAL ASSESSMENT.

3. *As to judgment of confirmation of special assessment.* Where a court has jurisdiction of the subject matter and the persons whose property is assessed, and power to adjudicate upon an application to

FORMER ADJUDICATION. SPECIAL ASSESSMENT. *Continued.*

confirm a special assessment, its judgment of confirmation will be conclusive upon all questions and objections that might have been interposed before judgment, and such questions can not be raised by a bill in chancery seeking to enjoin the collection of the assessment. *Kedzie et al.* v. *West Chicago Park Commissioners*, 280.

IN THE SUPREME COURT.

4. *Reviewing the same matters on a second appeal.* Where this court passes upon the equities of a case, reverses the decree therein, and remands the cause with special directions, the parties can not, by the introduction of additional evidence or by filing a cross-bill, have this court review and reconsider its former judgment. That can be only done by petition for a rehearing, in the manner prescribed by the rules of this court. *Norton et al.* v. *Moshier*, 146.

FORMER DECISIONS.

BUILDING AND LOAN ASSOCIATION.

1. *Validity of act of 1872—usury.* The ruling in *Holmes et al.* v. *Smythe et al.* 100 Ill. 413, sustaining the validity of the act, and that loans made in accordance with its provisions were not usurious, adhered to. *Freeman et al.* v. *Ottawa Building, Homestead and Savings Association*, 182. See BUILDING AND LOAN ASSOCIATION, 1.

FRAUD.

FRAUD AND DECEIT.

1. *False representations in respect to lands remote from place of making contract—how far a party may rely upon them.* Where a party effects an exchange of real estate situate in another State, with a person residing in this State, for property here, by means of false representations as to the quantity of his land, the location thereof, and the character of the improvements thereon, with a knowledge of the falsity of his representations, he will be liable to the injured party in an action on the case for fraud and deceit. Under circumstances like these, the person with whom the exchange is sought may rely upon the statements as being true, without being guilty of such negligence as to preclude a recovery by him for the fraud practiced on him. It might be different where the property is situated conveniently near, so as to permit an examination to be readily made. *Ladd* v. *Pigott*, 647.

2. *Instruction construed—as limiting the proof required.* See INSTRUCTIONS, 8.

IMPEACHING DECREE FOR FRAUD.

3. *Notification of defendant—diligence in ascertaining his residence.* A decree having been rendered upon merely constructive notice by publication, on the claim the defendant was a non-resident, and his place of residence not known, it was sought to impeach the decree for

FRAUD. IMPEACHING DECREE FOR FRAUD. *Continued.*

fraud, on the allegation that there was not proper dilgence used to ascertain the place of residence of the defendant, and by reason thereof he was not notified by a copy of the notice published being sent to his post office address, as might and ought to have been done; but upon a review of the evidence it was not deemed sufficient to impeach the decree upon that ground. *Vanpelt* v. *Hutchinson et al.* 435.

FRAUDULENT CONVEYANCES.

TO HINDER AND DELAY CREDITORS.

1. A person being in debt, conveyed his real and personal property to his son, under an agreement made for the purpose, on the part of both, to defeat, hinder and delay a creditor in the collection of his debt, no consideration being paid therefor, and with a secret understanding the son should hold the property for the use and benefit of the father, and reconvey it to him when requested, and if the father did not require a reconveyance, the son to take care of him and provide him with necessaries during his life, and have the property at his death. It was *held*, the sale and conveyance were fraudulent and void as to creditors of the father. *Gordon et al.* v. *Reynolds*, 118.

2. Even where the grantee pays a valuable consideration, if a part of the consideration is an undertaking and promise by the grantee to support and take care of the grantor, such an agreement renders the transfer void as to then existing creditors of the grantor. Ibid. 118.

3. *Distinction as to rights of prior and subsequent creditors.* If the fraudulent grantor reserves no future use or benefit in the property, then the transfer can be attacked only by preëxisting creditors; but where the conveyance is merely colorable, and a secret trust exists for the benefit of the grantor, then the sale is void, both as to precedent and subsequent creditors. Ibid. 118.

4. *Inadequacy of consideration.* The sale and transfer by a father to his son, of real estate of the cash value of $2500, and personal property of the value of $250, for the price of $500 paid, will be fraudulent as to existing creditors of the father, on account of the gross inadequacy of consideration. Ibid. 118.

FREEHOLD.

WHETHER FREEHOLD INVOLVED. See APPEALS AND WRITS OF ERROR, 13, 14.

GARNISHMENT.

EQUALITY AND PRIORITY AMONG CREDITORS.

1. *And in respect to what fund.* Under section 37 of the Attachment act, property, real and personal, attached, and funds in the hands of a garnishee, are placed on the same footing, and are held, from the time of the levy and service of the writ, for the benefit of all the creditors of the

GARNISHMENT.

EQUALITY AND PRIORITY AMONG CREDITORS. *Continued.*

attachment debtor who shall obtain judgments against him within the time and in the manner specified in the statute; and such fund can not be appropriated to the payment of any other creditors until those so entitled to share in the same have been ascertained and paid. *National Bank of America* v. *Indiana Banking Co.* 483.

CHECKING AGAINST DEPOSITS.

2. *Transfer of the fund by bank check drawn before and after service on the bank.* Where a depositor in a bank, before the service of process upon the bank as garnishee, at the suit of a creditor of the depositor, drew a check in favor of another, which was forwarded to the bank, and was by it paid in due course of business after the service of the writ, and charged to the account of the depositor, it was *held*, that the bank, as garnishee, was entitled to credit for the amount of the check so paid. Ibid. 483.

3. But if a bank pays checks drawn on it after it is served with garnishee process, it can not be allowed credit therefor as against the rights of creditors of the depositor entitled to share in the funds garnisheed. Ibid. 483.

4. *Applying the fund to payment of obligation of the depositor to the bank.* Where a depositor indorsed a promissory note of a third person, made payable to his order, and discounted the same in a bank where he had funds to his credit, it was *held*, that a payment of the amount due on such note by the indorser, to the bank, out of his funds on deposit, after the service of garnishee process upon the bank at the suit of a creditor of such indorser, could not be allowed the bank as a set-off, the indorser's liability to the bank being that, only, of a surety, and contingent. Ibid. 483.

FORM OF JUDGMENT—SURPLUS.

5. A judgment against a garnishee should be rendered in favor of the attachment or judgment debtor, for the benefit of the attachment or judgment creditor, who is treated as the real plaintiff, against his own debtor. Such judgment must, in form at least, be for the whole amount due from the garnishee, and whatever surplus there may be after paying the creditors entitled under the statute to share in the distribution to be made, belongs to the debtor in whose name the suit is prosecuted. Ibid. 483.

6. After the creditors entitled to share in the distribution of the property attached or funds garnisheed, have been paid, if equities exist between the garnishee and the attachment debtor as to the surplus, the court, no doubt, may adjust them, and thus avoid any hardships that may arise. Ibid. 483.

FUND IN HANDS OF RECEIVER.

7. *Not reached by garnishment.* See LIENS, 2.

GIFT.

REVOCATION.

1. *Gift revocable until executed—and when considered as executed.* A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. In such case the gift is not executed until the note is paid. *Williams* v. *Forbes, Admr.* 167.

PROMISSORY NOTE.

2. *Intended as a gift—not recoverable at law.* See CONSIDERATION, 1.

PAROL GIFT OF LAND.

3. *By a father to his son—specific performance of agreement enforced.* See CHANCERY, 26.

HIGHWAYS.

LAYING OUT PUBLIC ROADS.

1. *Appeal from commissioners of highways to three supervisors—grounds of appeal—powers of the commissioners pending the appeal.* An appeal from the decision of commissioners of highways in respect to laying out, etc., of roads, may be taken on grounds affecting the jurisdiction of the commissioners and going to the validity of the entire proceedings, or it may be taken on grounds affecting the appellant, only. In the latter case the appeal will suspend only so much of the order of the commissioners as affects the party appealing. *Pool et al.* v. *Breese*, 594.

2. Even the power to vacate proceedings to lay out a highway, conferred on the commissioners of highways by section 87 of the Road law, has been held to be suspended until the expiration of one year from the decision of the supervisors, on appeal,—that is, until the expiration of the time during which, by section 100, their decision in regard to laying out, altering, widening or vacating the road, or in refusing to do the same, is made final. Ibid. 594.

3. Where the grounds of appeal from an order laying out a highway go to the jurisdiction of the commissioners of highways, to the legality of their proceedings, and their failure to attempt to agree with the land owners in respect to damages, and to give notice of their application to have the damages assessed, and is also that the assessment of damages to the land owners is unjust, unfair and unlawful, its effect, though taken by only two land owners, is to vacate and set aside the entire order and decision of the commissioners as an entirety, and until the appeal is decided the commissioners have no authority of law to do any act to lay out or open any part of the road under their order. Ibid. 594.

4. During the pendency of an appeal from a decision of commissioners of highways laying out a road, to three supervisors, upon grounds affecting the validity of the order to lay out and open the road as an entirety, and until a final order is made and filed by the supervisors as

HIGHWAYS. LAYING OUT PUBLIC ROADS. *Continued.*

required by the statute, neither the commissioners of highways nor those acting under them can lawfully do any act to open any part of the road, even over the lands of land owners who did not join in the appeal, although the appellants may be estopped by their acts from afterward questioning the existence of the road as a legally laid out highway. *Pool et al.* v. *Breese*, 594.

5. *Action of the supervisors on an appeal—of the proper filing of the order to establish a road.* The making of an order for the laying out and opening of a public road by the supervisors, on appeal, and filing the same with a justice of the peace of the town, is not a compliance with the statute requiring the supervisors to file their order in the office of the town clerk, and the filing of a copy of such order by the justice of the peace with the town clerk will not cure the omission. Such order affords no justification for an entry upon the lands of a party and opening the proposed road. Compliance with the statute in proceedings to lay out roads, and in respect to the making and filing of the order authorizing the laying out and opening of the same, is mandatory. Ibid. 594.

6. *Estoppel to deny the legal existence of highway—by joining in appeal, etc.* Where a party, after appealing from an order of the commissioners of highways for the laying out of a public road upon grounds going to the validity of the entire proceeding, and before the appeal was decided, agreed with the commissioners as to his damages for the right of way over his premises, and accepted the same, it was *held*, that this estopped him from denying the existence of the highway, no matter whether it was a lawful existence or not, but could not have that effect upon other persons over whose land the alleged road ran, and who did not join in the appeal. Ibid. 594.

7. *Necessity of having authority to enter upon premises to open a highway—burden of proof.* Neither the commissioners of highways, nor others representing the public, have the right to enter the premises of another to lay out and open a highway, unless they can show a valid order of the commissioners conferring that authority, or a like order of the supervisors in case of an appeal to them. The burden is upon them to show, affirmatively, the existence of such order. Without it their acts are a nullity, and they become trespassers as to all persons not estopped by some act from denying the legal existence of such highway. Ibid. 594.

POWERS OF HIGHWAY COMMISSIONERS.

8. *To contract indebtedness.* The commissioners of highways have no authority of law to contract an indebtedness in respect to roads and bridges, when the money to pay the same is not in their treasury to be expended, or has not already been actually levied. *Sullivan* v. *Commissioners of Highways*, 262.

9. But where a tax has been levied by them, though the proceeds of such levy may have been intended by the commissioners to be applied

HIGHWAYS. POWERS OF HIGHWAY COMMISSIONERS. *Continued.*

in a way distinct from the making of a culvert, a party who builds a culvert for them under a contract, who has no notice that the levy was not made to pay for the same, and where there is nothing to afford notice of the purpose of the levy, may recover of the contract price a sum equal to such levy, and no more; and the fact that he was compelled to accept an order for the sum due, if such was not the agreement before the work was done, will not prevent a recovery upon an order not exceeding the tax levied for that year. *Sullivan* v. *Commissioners of Highways*, 262.

10. *Contracting to pay interest.* Where commissioners of highways contract for services and work in anticipation of taxes already levied, and give an order for payment, upon their treasurer, payable at a future day, they will have no power to agree to pay interest on the same; and if such order provides for interest, that part thereof may be treated as void, and only the principal can be recovered on such order. Ibid. 262.

STREETS AND SIDEWALKS.

11. *Corporate duty and liability in respect thereto—injury from defective street and sidewalk—as to character of the use allowable.* See MUNICIPAL CORPORATIONS, 9, 10, 11.

12. *Liability of city for injury to child rolling hoop on defective sidewalk—imputing negligence to child of ten years.* See NEGLIGENCE, 7 8.

HOMESTEAD.

IN CASE OF DIVORCE.

1. *Effect of a divorce at the suit of the wife, as to her homestead right.* Where a wife procures a divorce from her husband, the court is authorized to make disposition as to the homestead; but if the court fails to do this, the relation of husband and wife being severed by the decree of divorce, the latter loses all claim to a homestead, so that the husband may sell the premises without her release of homestead right. It is different in respect to the wife's dower, which is not lost by a divorce for the husband's fault. *Stahl* v. *Stahl et al.* 375.

2. The surviving wife of a deceased householder, who is made to succeed to his estate of homestead, is the one who is his wife at the time of his death. A divorced wife will take no rights in the homestead. Ibid. 375.

HUSBAND AND WIFE.

LEGALITY OF MARRIAGE.

1. *Presumptions in respect thereto—long continued absence of former husband or wife.* See MARRIAGE, 1 to 4.

WITNESSES.

2. *Competency of wife as witness for her husband.* See WITNESSES, 3, 4.

IMPEACHMENT OF WITNESS. See WITNESSES, 7, 8.

INFANTS.

NEGLIGENCE.

Whether negligence can be imputed. See NEGLIGENCE, 8.

INSOLVENT DEBTORS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Place where deed may be acknowledged—the statute construed.* A deed of assignment by a failing debtor to assignees, for the benefit of creditors, is not required by the statute to be acknowledged in the county where the grantor resides, but must be there recorded. The words in the first section of the act of 1877, that "every assignment shall be duly acknowledged and recorded in the county where the person or persons making the same reside," do not require the deed to be acknowledged at the county of the grantor's residence. There should be a comma after the word "acknowledged." *Zimmerman* v. *Willard et al.* 364.

2. *Sufficiency of certificate of acknowledgment.* A certificate of the acknowledgment of a deed by a debtor, of his lands, etc., for the benefit of creditors, which stated that the grantor was personally known to the officer, and that he appeared before such officer and made the acknowledgment of the deed, is substantially good, as sufficiently showing that the grantor did appear in person before the officer, at least under the act relating to voluntary assignments. Ibid. 364.

3. *If in fraud of creditors—of right to attack the assignment after county court has assumed jurisdiction.* If the assignment by a debtor for the benefit of certain of his creditors is made for the purpose of defrauding certain other of his creditors, it will be void as to the latter; and the fact that the county court has assumed jurisdiction of the subject matter of the assignment, and appointed new assignees, will not prevent creditors so attempted to be defrauded from attacking the deed for fraud, in a collateral proceeding, when it is sought by it to withdraw property attached by them, and place the same in the hands of the assignees appointed by the court. Ibid. 364.

PLEADING.

4. *Alleging fraud in deed of assignment.* See PLEADING, 3.

WITNESSES.

5. *Competency of grantor in deed of assignment.* See WITNESSES, 5.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *Of the degree of accuracy required.* The correctness of instructions is to be tested by the evidence and facts in each particular case. They will be sufficient if they state the law with reasonable accuracy, in

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

view of the evidence in the case. To require absolute technical accuracy in all cases, would be, under the administration of the criminal law, so difficult, as to make it almost impracticable to secure a conviction. *Davis* v. *The People*, 86.

2. *Assuming a fact not disputed.* Even if an instruction given on the trial of one for murder should assume the fact that the killing was shown by the evidence, where the fact of the killing is not a disputed fact, but is conceded, that would afford no ground of error. Ibid. 86.

3. *Whether assuming facts.* Where the propositions in an instruction are all made to rest upon what the jury shall believe from the evidence, or when it states a hypothetical case, which, if the jury believe, from the evidence, existed, they may consider, it will not be liable to the objection it assumes there is evidence of the fact, or indulges in presumptions that there is evidence to prove such propositions. *Ladd* v. *Pigott*, 647.

4. *Singling out a particular fact.* In a suit upon a note given by an agent, the court was asked to instruct the jury that the fact that defendants authorized the agent to sign their firm name to notes, to a certain firm named, or to others, did not of itself authorize him to sign their name to the note sued on,—which was refused: *Held*, that the instruction was bad in singling out a particular fact, and telling the jury that such, alone, would not warrant a recovery. *Crain et al.* v. *First National Bank of Jacksonville*, 516.

5. *Not applicable to any issue.* On bill by a wife for divorce, where the only issue by the pleadings was, whether the husband had deserted her for two years prior to the filing of the bill, the defendant asked the court to instruct the jury, that if they believed, from the evidence, that the complainant had a husband living at the time of her marriage with defendant, they should find for him, which the court refused: *Held*, properly refused, for the reason there was no such issue. *Johnson* v. *Johnson*, 611.

6. *Proper reference to the evidence.* An instruction based upon admitted facts or facts not disputed, is not erroneous merely from the fact it fails to contain the words, "if you believe, from the evidence," such facts. Such reference to the evidence is necessary only when the facts hypothetically stated are controverted. *Schmidt* v. *Pfau*, 494.

INSTRUCTIONS CONSTRUED.

7. *Whether leaving construction of verbal contract to the jury.* An instruction in a suit to recover for lumber sawed and delivered, partly under a written contract, as alleged, and partly under a verbal one, directing the jury that if they found, from the evidence, that a part of the lumber was furnished on a verbal contract made subsequent to the one in writing, then they should find, from the evidence, what the terms of such contract were, and be governed by them, is not obnoxious to

INSTRUCTIONS. INSTRUCTIONS CONSTRUED. *Continued.*

the objection that it submits to the jury the construction of such verbal contract, and is not improper. *Mulliner* v. *Bronson*, 510.

8. *Whether to be construed as limiting the proof required.* In an action on the case for fraud and deceit in the exchange of property, the defendant asked the court to instruct the jury that the plaintiff was not entitled to recover unless they should find, from the evidence, that the defendant made the representations alleged in the declaration. The court gave the instruction, but added thereto, "or some material part thereof:" *Held*, that as modified it did not mean that the plaintiff might recover if he proved some of the material representations alleged, but that he must prove all that were material of such representations, which, strictly speaking, is the law. *Ladd* v. *Pigott*, 647.

AMENDMENT BY ERASURE.

9. *Leaving words still legible.* It was objected that in erasing a sentence from an instruction, the words were still legible. The matter intended to be stricken out was of no importance whatever, and it mattered little whether the jury could still read it or not. The words so crossed out were still legible, but not plainly so, and it was not likely any jury would consider them after they had been erased in that manner. There was nothing in the objection. *Union Railway and Transit Co.* v. *Kallaher, Jr., Admr.* 325.

OF THE COURT'S OWN MOTION.

10. *Whether imperative—party failing to ask for particular instruction.* While a court may very properly give an instruction on its own motion, in a case, yet its failure to do so can not be urged as error. By failing to ask for a particular instruction, or one on a particular branch of the case, the party complaining must be regarded as waiving any right to the same. *City of Chicago* v. *Keefe, Admr.* 222.

INSURANCE.

LIFE INSURANCE.

1. *Mutual benefit association—tender of annual and special assessments—notice.* The certificate of membership in a mutual benefit association required the holder to pay an annual assessment of three dollars on or before a certain day in each year, and in and by which the member agreed to pay, on the death of every member, an assessment, never to exceed one dollar and twenty cents, and provided further, that if the said annual and special assessments, etc., should not be received by the association within thirty days from date of the notice, the certificate should be null and void: *Held*, in the absence of a notice, no tender of the amount of such assessments was necessary in order to prevent a forfeiture of membership. Under such certificate, the holder of the certificate would be entitled to notice of the annual assessment before he could be in default for its non-payment. *Covenant Mutual Benefit Association of Illinois* v. *Spies et al.* 463.

INSURANCE. LIFE INSURANCE. *Continued.*

2. *Proof of death before suit brought—waiver in respect thereto.* In a suit upon a certificate of membership providing for the payment of a given sum to the widow and heirs of the member upon his death, the association issuing the same may waive proof of the death before suit brought. *Covenant Mutual Benefit Association of Illinois* v. *Spies et al.* 463.

3. So where a by-law of a mutual benefit association provided that upon receipt of notice of the death of a member the secretary should immediately forward to the representatives of the deceased the proper blanks, and full instructions how to make proofs of death, and the association, upon notice of the death of a member, with a request to send the blanks and instructions as to the required proof, failed to send the same, on the claim that the deceased had forfeited his rights and his certificate had been cancelled, and refused payment of the sum named therein on that ground alone, it was *held*, that this was a waiver of the preliminary proof of death. Ibid. 463.

4. *By-laws of the association, as entering into the contract of insurance.* The by-laws of an association for mutual benefit, in the nature of life insurance, are binding upon it and all its members, and its contract for the payment of money to the widow and heirs of a deceased member is to be considered and construed with reference to its powers and duties as fixed by its charter, and by-laws pursuant thereto; and such widow and heirs have the right to rely on the performance of such by-laws. Ibid. 463.

5. *Contract construed as to payee or beneficiary.* A mutual benefit association, the charter and by-laws of which declared its object and business should be to afford financial aid and assistance to the widow, orphans, heirs, or devisees of deceased members, issued a certificate of membership to a member, which provided that upon proof of his death, he having complied with its conditions, an assessment should be levied upon the surviving members to the amount of the certificate, ($5000,) which "sum so collected on such assessments (less expenses and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit to his devisees, as provided in last will and testament, or in the event of their prior death, to the legal heir or devisees of the certificate-holder:" *Held*, that the promise was, in substance, to pay to his devisees if there should be devisees to take, and if not, then to pay to his heirs, and that they might recover on the same. *Covenant Mutual Benefit Association of Illinois* v. *Sears et al.* 108.

6. *When in the nature of a wager.* It would seem that a policy or certificate for the payment of a premium to one who may hold a number next to that held by the one who dies, and solely because he does die, makes the transaction in the nature of a wager upon the life of one in whom the party thus benefited has no interest, and is therefore illegal. *People ex rel. Swigert* v. *Golden Rule et al.* 34.

INSURANCE. *Continued.*

ACCIDENT INSURANCE.

7. *Death from accident while engaged in the discharge of duty—voluntary exposure.* Where a party insured against injuries effected through external, violent and accidental means, receives an injury while in the discharge of his regular duties as yard-switchman or brakeman of a railway company, from which he dies, a recovery can not be defeated on the ground of voluntary exposure to danger, when the accident is one contemplated by the parties to the insurance. *National Benefit Association* v. *Jackson*, 533.

PREMIUM—PAYMENT TO INSURANCE BROKER.

8. *The question one of agency, and of evidence in respect thereto.* A party desiring to insure certain property, applied to an insurance agent of his place to procure the insurance, leaving him to select the company. He forwarded the application to certain insurance brokers in Chicago, who procured the policy in a company with which they had considerable dealing, and sent the same to the assured through the first named agents, and he sent the premium to the agents in Chicago, who never forwarded the same to the insurance company. The policy contained the usual clause that it should not be binding until the actual payment of the premium. A loss occurred, and payment was refused, when suit was brought on the policy, and a recovery had: *Held*, that the liability of the insurance company depended upon the fact whether the Chicago agents were its agents, or were authorized to receive payment in its behalf. *Sun Mutual Ins. Co.* v. *Saginaw Barrel Co.* 99.

9. Where insurance brokers procuring a policy of insurance received payment of the required premium, and failed to return the same to the insurance company, it was *held*, that the correspondence between the brokers and the company was proper evidence for the purpose of showing their previous relations and methods of business in respect to insurance effected through them, and as tending to show they were, in fact, agents of the company, and as such authorized to receive payment of the premium. Ibid. 99.

PAYMENT OF PREMIUM.

10. *Waiver of cash payment of premium and dues by taking an order—notice.* An insurance company has the right to waive a cash payment of the premium and dues required in the policy, and accept in lieu thereof an order for the same, given by the assured on a third person; and when it does so, and gives a receipt for the amount, it can not defeat a recovery upon the policy, and insist upon a forfeiture as for non-payment of the premium and dues, without having given the assured notice of the non-payment of the order. Such a case differs from one where the assured gives his promissory note for the premium, which he fails to pay when due, and in which the policy provides for a forfeiture for non-payment of the note. *National Benefit Association* v. *Jackson*, 533.

INSURANCE. *Continued.*

TRANSFER OF INSURANCE POLICIES.

11. *Of ability to assign insurance policies.* On bill for the specific performance of a contract for the sale and exchange of city property, where the complainant was to have certain policies of insurance on the buildings held by him assigned to the defendant, who repudiated the contract, the evidence showed that the insurance agent consented to the transfers: *Held*, that in the absence of proof to the contrary, it would be presumed the agent was willing to make the necessary indorsements of consent to their transfer. *Lyman* v. *Gedney*, 388.

INSURANCE COMPANIES.

12. *Assuming to transact insurance business without sufficient legal authority—prosecutions by quo warranto on relation of the Auditor.* See QUO WARRANTO, 1.

FOREIGN INSURANCE COMPANIES.

13. *Tax or license by cities and villages—under acts of 1872 and 1879.* Section 110 of the act of 1872, in relation to cities and villages, requiring foreign insurance companies to pay to the treasurer of the city or village two dollars on the $100 of the net receipts of their agency in such city or village, is repealed by section 30 of chapter 73, passed in 1879, and no action lies against such companies or their agent under the act of 1872. *City of Chicago* v. *James*, 479.

14. The tax or license mentioned in the proviso to section 30 of chapter 73, passed in 1879, requires affirmative action by the city or village that may be entitled to it, in fixing the rate, which must not exceed two per cent of the gross instead of the net receipts of the agency. Ibid. 479.

INTEREST.

COMMISSIONERS OF HIGHWAYS.

Of their power to contract indebtedness and to pay interest. See HIGHWAYS, 10.

JUDGMENTS.

FORM OF JUDGMENT.

1. *In proceedings by garnishment.* See GARNISHMENT, 5.

JUDGMENT FOR TAXES.

2. *How far conclusive as to legality of taxes.* A judgment of the county court against lands for taxes, where there is no personal appearance of the owner, is not conclusive as to the legality of all the taxes included in it, but is open to attack collaterally. *Gage* v. *Busse et al.* 589.

SATISFACTION OF JUDGMENT.

3. *By attorney of record.* A father conveyed land to his daughter on March 29, 1878, and on June 6, 1878, a judgment was recovered against him and another, upon which an execution was issued, and returned

JUDGMENTS. SATISFACTION OF JUDGMENT. *Continued.*

"no property found." On June 9, 1879, the father compromised with the plaintiff in the judgment, and on that day the attorney of record for the plaintiff gave a receipt in full, and entered satisfaction upon the margin of the record. On June 29, 1879, the daughter reconveyed to her father, and the title passed from him to one who sold the land, and his title was objected to as being subject to the lien of the judgment: *Held*, that the purchaser could not refuse to complete the purchase on this ground, and that the judgment never was a lien on the land. *Lyman* v. *Gedney*, 388.

VACATING JUDGMENT.

4. *Trial de novo—on appeal—effect as vacating judgment appealed from.* See APPEALS AND WRITS OF ERROR, 16.

5. *In Supreme Court—when entered under misapprehension of fact.* See PRACTICE IN THE SUPREME COURT, 11.

JUDGMENT LIENS. See LIENS, 2.

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL POWER.

POWERS OF JUDGE.

1. *In vacation.* A judge of a circuit court in vacation can make orders only to the extent the statute authorizes him to do. The statute is the measure of his authority in vacation. He can enter no general orders, and can render no judgment in vacation, merely by virtue of his general powers as judge. *People ex rel. Swigert* v. *Golden Rule et al.* 34.

JURISDICTION.

CONFLICT OF JURISDICTION.

1. *Power of State courts to correct mistakes in decrees of Federal court.* A State court is not empowered to review the judgments, decrees and orders of a United States District Court, and rectify the errors therein. *Ritchie et al.* v. *Pease*, 353.

IN CHANCERY.

2. *To enforce legal rights, as distinguished from those which are merely equitable.* See CHANCERY, 3.

3. *To try legal titles—court of law the proper forum.* Same title, 1, 2.

4. *Setting off unliquidated damages against judgment at law—when denied.* Same title, 4.

LACHES. See LIMITATIONS, 6 to 9.

LANDLORD AND TENANT.

WHETHER THE RELATION EXISTS.

1. *As between vendor and purchaser.* The purchaser entered into possession under an agreement that the purchase money was not to be paid unless the vendor should, within three years, make him a warranty deed conveying a perfect title, and in case of failure to make him such conveyance the purchaser was to remain in possession of the premises for the period of three years, and pay a reasonable rent for the time he could hold peaceable possession, and before the expiration of the three years he acquired the title from other parties. In such case the relation of landlord and tenant did not exist between the parties after the expiration of the three years. The purchaser was not bound to pay rent after that time, he having in the meantime acquired title to the premises from another source independent of his vendor, and the "reasonable rent" the purchaser was to pay on failure of his vendor to make a deed, was intended as compensation for the use of the land for such period as he might peaceably hold possession during the three years. *Green* v. *Dietrich*, 636.

TENANCY AT SUFFERANCE.

2. *What so regarded.* Where one having no title to premises leases the same from the owner, and puts another in possession thereof under a promise to give to the latter the property in case he can acquire the title, the person so put into possession will occupy the position of merely a tenant at sufferance of the party having the leasehold interest. *Kaufman* v. *Cook*, 11.

LARCENY. See CRIMINAL LAW, 2.

LIENS.

RESERVATION CLAUSE IN DEED.

1. *Purchaser assuming incumbrance—of the lien created thereby in favor of the holder of the incumbrance.* The owner of a tract of land, after having given a deed of trust to secure an indebtedness of $800, in which he intended to include the same and other land, but in which the tract first mentioned was omitted by mistake, sold and conveyed the same by a deed containing a clause that it was subject to such trust deed and another one, describing the same and the date of their record, and then reciting that it was understood that the grantee, as a part of the consideration of his deed, assumed the payment of the several sums so secured by such trust deeds, with the interest, etc.: *Held*, that the reservation or assumption clause in the deed of conveyance was, in effect, the creation of an express lien, by contract, on the land conveyed, for a portion of the purchase money, in favor of the holders of the notes described in the trust deeds, which followed the land into the hands of all persons claiming under the grantee. *Sidwell* v. *Wheaton*, 267.

LIENS. *Continued.*

JUDGMENT LIENS.

2. *As to property in hands of a receiver.* The recovery of a judgment against partners after the appointment of a receiver to take charge of the firm assets for the benefit of the firm creditors generally, creates no lien against any property or funds of the firm in the hands of the receiver. Such property or funds can not be levied on by an execution, or reached by garnishment, for the reason of its being in the custody of the law. *Jackson et al.* v. *Lahee*, 287.

NOTICE OF LIEN.

3. *As to prior incumbrance—by recitals in recorded deed.* See NOTICE, 1.

LIFE.

OF ABSENT PERSON.

General presumption as to its continuance. See MARRIAGE, 4.

LIMITATIONS.

WHEN THE STATUTE BEGINS TO RUN.

1. *Service by the year.* Where services are performed by one for another by the year, without any agreement as to the time for their payment, the law will presume them as payable at the end of each year, and the Statute of Limitations will not run against the first year's services until the end of that year. *Schmidt* v. *Pfau*, 494.

ADMISSION OF INDEBTEDNESS.

2. *As taking case out of the statute.* An admission of a party that he owes another for services rendered, within five years before action brought, will take the case out of the Statute of Limitations, although the amount to be paid for such services may not have been fixed. Ibid. 494.

LIMITATION ACT OF 1839.

3. *As to vacant and unoccupied land—entry under color of title—evidence—presumption.* Where a defendant in ejectment shows the payment of all taxes on the land, under color of title, for seven consecutive years while the land was vacant and unoccupied, and he is found or shown to be in possession when the action is brought, it will be presumed that his possession was under his color of title, especially when that fact was not disputed on the trial. *Holbrook* v. *Gouveneur*, 623.

4. And where a party, as a condition to his being let in as a defendant in an action of ejectment brought in 1866, was required to admit by his plea that he was in possession of the premises when the suit was brought, and it was admitted that the land was vacant until the year 1862, when the plaintiff, without objection, read in evidence the return on the declaration, which showed that the defendant, another party, was then in possession, and judgment was for the defendant, it was *held*,

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

that the judgment should not be reversed on the ground of the slightness of the evidence showing the defendant's actual possession under color of title before suit brought. *Holbrook* v. *Gouveneur*, 623.

LIMITATION ACT OF 1872.

5. *Effect of act as to note given prior to that time.* The Limitation act of April 4, 1872, which took effect July 1, 1872, has no application to a promissory note given in January, 1872, payable two years after the date thereof. The limitation law of sixteen years applies to such a note. *Means et al.* v. *Harrison, Exr.* 248.

LAPSE OF TIME ASIDE FROM THE STATUTE.

6. *Laches—as against a claim of a trust in land.* Where a person purchased in the outstanding titles to land in his own name, presumably for his own use, and for several years after and until his death held the land under such title as his own, and his widow and heir held the same for thirteen years after his death, and expended considerable sums in improvements upon the property before bill was filed by another claiming that the purchase was made for his benefit, it was *held*, that the *laches* was such as to prevent equitable relief. *Green* v. *Dietrich*, 636.

7. *From what time to be computed—as against the establishment of a resulting trust.* A party who takes a conveyance of land in his own name, partly paid for with the money of another placed in his hands, can not set up as a defence to a bill to enforce a resulting trust, the *laches* or delay of the complainant for the time he has admitted and recognized his equitable rights. Such defence will avail him only from the time he sets up an adverse claim, and denies the complainant's rights. *Springer* v. *Springer*, 550.

8. *As a bar to dower right.* Where a widow has brought suit for the assignment of her dower in proper time, and has persistently been seeking such assignment for about twenty years, and has been delayed by appeals and the contesting of her right, she will not be barred of the same on the ground of *laches*. *Stowe* v. *Steele*, 382.

9. No period short of seven years' adverse possession under claim and color of title and the payment of the taxes, will work a bar to the claim of dower; and the same strictness of proof as in actions of ejectment will be required to sustain the bar. Ibid. 382.

MANDAMUS.

OF THE PETITION.

1. *Necessary averments.* Where a village clerk, by the charter of the village, is given thirty days after the passage of all ordinances within which to post up copies thereof, if the relator desires to rely on a standing resolution of the village council requiring the clerk to post notices and ordinances within five days after their passage, unless otherwise directed, he should set it up in his petition, and by proper averments

MANDAMUS. OF THE PETITION. *Continued.*

negative the fact of his having been otherwise directed. A party can not make one case by his pleading and a different one by his proof, and recover. *Gormley* v. *Day*, 185.

AWARDING THE WRIT.

2. *When the ground of action has ceased to exist.* A court will not award a peremptory writ of *mandamus* when the right sought to be enforced is or has become a mere abstract right, the enforcement of which, by reason of some change of circumstances since the commencement of the suit, can be of no substantial or practical benefit to the petitioner. Ibid. 185.

3. So where an ordinance of a village vacating a street was repealed before it went into effect, but after the filing of a petition for a *mandamus* to compel the village clerk to post copies of the same or give the relator copies thereof, the court will not award the writ, as to do so would subserve no beneficial purpose. Ibid. 185.

4. *Whether action is premature.* Where a village clerk, by the charter of the village, is given thirty days after the passage of all ordinances within which to post up copies thereof, a proceeding by *mandamus*, commenced before the expiration of that time, to compel him to post an ordinance, must fail, the clerk not being in default when the suit was brought. Ibid. 185.

PROBATE OF WILL.

5. *As to matters involving discretion—of time of receiving probate of will.* Where the exercise of a discretion is involved, a writ of *mandamus* will not be allowed against an inferior court or tribunal. So the discretion of the county or probate court as to the time it will receive probate of a will, or which of two papers purporting to be the wills of the same person, shall be passed upon first, will not be interfered with by this writ. *The People ex rel. Storey* v. *Knickerbocker*, 539.

MARRIAGE.

VALIDITY OF MARRIAGE.

1. *Presumptions in respect thereto—long continued absence of former husband.* Where a marriage in fact is shown, the law raises a strong presumption in favor of its legality, and the burden of proof is on the party contesting its validity to show that it is not valid. *Johnson* v. *Johnson*, 611.

2. So, although the presumption in favor of the validity of a marriage in fact, and of the innocence of the contracting parties, may conflict with that of the continued life of a former husband or wife not heard from for a period less than seven years prior to the second marriage, yet if neither presumption is aided by proof of facts or circumstances coöperating with it, the presumption of the validity of the second marriage must prevail over the other. Ibid. 611.

MARRIAGE. VALIDITY OF MARRIAGE. *Continued.*

3. Where a woman, six years after her husband was last heard from, is married to another man, and the validity of the latter marriage is brought in question many years afterward, on the presumption that her former husband was living at the time of such last marriage, the court may take into consideration the fact that the former husband has not since that time been heard from; and in such case the dissolution of the former marriage by death or divorce before her second marriage will be presumed. *Johnson* v. *Johnson*, 611.

4. The general presumption is that life continues for seven years after an absent party is last heard from, and after the lapse of that time, death is presumed; but the presumption is not conclusive, and may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. Ibid. 611.

MASTER AND SERVANT.

NEGLIGENCE OF MASTER—INJURY TO SERVANT.

1. *Duty of master to use proper precautions for the safety of the servant—as, in the unloading of cars, to avoid collisions, etc.* In an action to recover for personal injuries resulting from alleged negligence, it appeared the defendant company put the plaintiff and others of its servants to work unloading a railroad freight car standing on a spur of a side-track having connection with other tracks only at one end, and being a track not used for passing trains, and there being nothing to lead the laborers to believe the car they were unloading would be disturbed, and while so engaged the loaded car was violently struck by other cars which became detached from an engine used in switching cars in the yard, whereby the plaintiff was injured. It was *held*, that it was the duty of the defendant not to have brought on this peril without timely notice to the laborers so engaged; that either the cars ought not to have been brought into the position they were, without notice, or it should have been first ascertained that no danger to the laborers could result therefrom, and that the failure to do so was gross negligence. *North Chicago Rolling Mill Co.* v. *Johnson*, 57.

2. The attempt to bring a train of cars on the switch to a point where the defendant's servants were engaged in unloading a car, where the grade was a descending one, without notice to them, or any signal by the bell or whistle of the engine of the approach on such track, and without having the moving cars under control by proper and sufficient couplings and brakes attached, the yard-master knowing that men were engaged all around the car they were unloading, was gross negligence on the part of the defendant. Ibid. 57.

3. *As to whose duty it was to see that the appliances for controlling the moving cars were in proper order, etc.* In such an action, where the injury resulted from the uncoupling of certain cars in a train being

MASTER AND SERVANT.

NEGLIGENCE OF MASTER—INJURY TO SERVANT. *Continued.*

switched in the defendant's yard, so that they could not be controlled by the engine, and from a defective brake on one of the detached cars which struck the car on which the plaintiff was engaged at work, it was held to be wholly immaterial whose duty it was to inspect the couplings of the cars, brakes, etc., or how on that occasion the engineer handled his train, and that proffered evidence in such respect was properly excluded. *North Chicago Rolling Mill Co.* v. *Johnson*, 57.

4. *As to what is negligence—evidence in respect thereto—custom at other places as to the mode of handling railroad cars.* Where the charge of negligence of a defendant is the sudden starting of a detached car upon which the plaintiff was engaged in unloading brick, without previous notice or warning, by the collision of other cars being pushed back, evidence tending to show that the pushing of the cars instead of pulling them was not negligence, is inadmissible. The custom in other yards as to pushing or drawing cars in such a case is wholly immaterial. Ibid. 57.

5. *Proof of custom as to watchfulness of railroad laborers in loading and unloading cars.* In an action by a laborer employed by defendant, to recover for an injury caused by the collision of other cars being switched, with the one on which he was unloading brick, without any signal or warning, the court sustained an objection to this question asked by the defendant of a witness, who was a switchman: "What, if any, was the rule or custom as to laborers unloading and loading cars, and switchmen, with reference to the laborers looking out for the movement of their car while being loaded or unloaded?" *Held*, that the ruling was correct, as it was not shown there was any rule or custom in this respect. If the men were enjoined to keep a lookout constantly for the approach of trains while at work, that fact was susceptible of proof. Ibid. 57.

SERVANT TAKING THE HAZARD.

6. If a person knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless it may be caused by the willful act of the master. *Stafford* v. *Chicago, Burlington and Quincy Railroad Co.* 244.

FELLOW-SERVANTS.

7. *Who to be so regarded.* Servants of the same master, to be co-employes or fellow-servants, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, must be such as are directly coöperating with each other in a particular business,—that is, the same line of employment,—or such that their usual duties shall bring them into habitual association, so that they

MASTER AND SERVANT. FELLOW-SERVANTS. *Continued.*

may exercise a mutual influence upon each other promotive of proper caution. *North Chicago Rolling Mill Co.* v. *Johnson*, 57.

8. The relations of the servants must be such that each, as to the other, by the exercise of ordinary caution can either prevent or remedy the negligent acts of the other, or protect himself against its consequences. Where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of an immediate superior, the doctrine exempting the master can have no application. Ibid. 57.

9. *Injury to one servant from the negligence of another—liability of the common master.* Where one servant is injured by the negligence of a fellow-servant, the duties of both being such as to bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution, and the master is guilty of no negligence in the employment of the servant causing the injury, the master will not be liable for the injury. *Stafford* v. *Chicago, Burlington and Quincy Railroad Co.* 244.

10. *Burden of proof—negligence of master.* In a suit by a servant against his employer to recover damages for a personal injury from negligence of a fellow-servant, if it is claimed that the master was guilty of negligence in selecting or retaining incompetent servants, the burden is on the plaintiff to prove it. Ibid. 244.

MEASURE OF DAMAGES.

DEATH FROM NEGLIGENCE.

1. *In action by next of kin.* The question of the compensation to be awarded to the next of kin of a deceased person, under the statute, (chap. 70, sec. 2,) for their pecuniary loss from his death, is not in its nature capable of exact determination. Therefore the jury should calculate the damages in reference to a reasonable expectation of benefit, as of right, or as of grace or favor, from the continuance of the life. *City of Chicago* v. *Keefe, Admr.* 222.

MERGER.

CONVEYANCE BY MORTGAGOR TO MORTGAGEE.

Whether an extinguishment of the mortgage. See MORTGAGES AND DEEDS OF TRUST, 1.

MISTAKE.

REFORMING DEEDS, ETC., IN EQUITY.

1. *As to description of land in deed of assignee in bankruptcy—correcting as against creditors.* See CHANCERY, 18.

PAROL EVIDENCE.

2. *To identify land under misdescription in deed.* See EVIDENCE, 4.

MORTGAGES AND DEEDS OF TRUST.

CONVEYANCE BY MORTGAGOR TO MORTGAGEE.

1. *Whether an extinguishment of the mortgage.* Where the mortgagor conveys the mortgaged premises to the mortgagee and another, and the mortgagee afterwards conveys to that other, this will extinguish the mortgage. *Lyman* v. *Gedney*, 388.

SATISFACTION OF MORTGAGE.

2. *Satisfaction by one of two joint mortgagees, good.* Where a mortgage is given by a debtor to two persons, to secure the payment of a sum of money to them jointly, either one of them, on payment to him, may enter satisfaction of the mortgage upon the record thereof, and if he is dead, proof of his signature and that of the attesting witness will be sufficient to show satisfaction. Ibid. 388.

FORECLOSURE—POSSESSION.

3. *Power of the court to put purchaser in possession of land—exceptions to the general rule.* See CHANCERY, 19, 20.

CONVEYANCE IN TRUST TO SECURE CREDITORS.

4. *Preference of creditors—what creditors to be preferred, within the terms of an agreement—whether a lien is necessary.* An agreement between a debtor and a trustee to whom the former had land conveyed to secure his creditors, provided that the trustee should sell the lands and apply the proceeds, first, to the payment of all incumbrances on the land, whether secured by mortgage or otherwise, amounting to $16,000, after which other debts were to be paid. It appeared that at the date of the conveyance and agreement, the debtor owed A $12,000 and B $4000, which debts were not incumbrances or liens on the lands, but no one else claimed such preference, and also that the debts due A and B were those intended by the parties, and that the trustee afterward, by his letter, and schedule and exhibit in bankruptcy, declared that he held the lands in trust to secure the claims of A and B: *Held*, that the fact that the debts of A and B were not liens upon the lands could not defeat the trust, and that they were entitled to be first paid out of the proceeds of the lands. *Rankin* v. *Barcroft & Co. et al.* 441.

5. *Subrogation—in favor of trustee or debtor paying preferred debt.* Where a person accepts time drafts drawn on him by a debtor in favor of a creditor, and takes a conveyance of land in trust, out of which to pay, first, such indebtedness, and afterward other debts, and he pays a portion of such preferred debt, he will not be entitled to be subrogated, as to such payment, to a prior lien which may be held by the preferred creditor. In such case, the person making the payment occupies the position of mortgagor or debtor, and has no preference, as to the payment made, over the other creditors secured. Ibid. 441.

6. *Bankruptcy—its effect upon trust property in the hands of a bankrupt.* Upon an adjudication in bankruptcy, the debt due a trustee so adjudged, if any, on account of his trust, and his property rights in

MORTGAGES AND DEEDS OF TRUST.

CONVEYANCE IN TRUST TO SECURE CREDITORS. *Continued.*

lands held by him in trust, pass to his assignee, but his duties as trustee remain unaffected by the proceeding. If any claims in favor of the trustee vest in his assignee which are prior liens upon the trust lands, it is the duty of the trustee to pay them off, and for so doing he is entitled only to the sum paid by him. *Rankin* v. *Barcroft & Co. et al.* 441.

7. *Declaration of trust—at what time it may be made.* Where lands have been conveyed to one without any attempt to declare a trust at the time, but a trust was intended, he may afterward, by letter or any other instrument in writing, declare that he holds the same in trust, and such declaration of trust will be binding. The right to thus declare a trust in the first instance implies the right to make certain and specific a trust before attempted to be declared. Ibid. 441.

MUNICIPAL CORPORATIONS.

CORPORATE POWERS.

1. *Generally.* A municipal corporation, being the creature of law, possesses only such properties and powers as its charter confers upon it, either directly or as incidental to its very existence. So long as it acts within its corporate powers it may bind the people within its limits, but when it transcends it powers, its acts are nugatory. *Mather* v. *City of Ottawa*, 659.

2. *Implied powers, in aid of express powers.* An express grant of power to a municipal corporation, or other person, to do a given thing, carries with it, by implication, authority to use the necessary means by which it can be done. So the power to borrow money for a proposed public improvement by an incorporated city, gives, as a necessary incident, the power to issue its bonds for the money. *Dutton* v. *City of Aurora et al.* 138.

POLICE POWERS.

3. *Under general Incorporation law—of their extent as to subject matter.* Subdivision 66 of section 62, article 5, of the "Act to provide for the incorporation of cities and villages," which reads that the city or village council shall have power "to regulate the police of the city or village, and pass and enforce all necessary police regulations," is not limited in its aplication to the organization and regulation of a police force, but may extend to and embrace a subject matter of police regulation, under the general police power of the State. *McPherson* v. *Village of Chebanse*, 46.

MUNICIPAL INDEBTEDNESS.

4. *Limitations as to power of contracting.* A limitation in a special city charter as to the rate of taxation is binding only upon the municipal authorities, and not upon the General Assembly; but section 12, of article 9, of the constitution, which prohibits the incurring of corporate debts

MUNICIPAL CORPORATIONS. MUNICIPAL INDEBTEDNESS. *Continued.*

exceeding five per cent on the value of the taxable property of the municipality, is equally binding on the legislature. *Dutton* v. *City of Aurora et al.* 138.

5. *Constitutional limitation—as affecting power to improve streets, etc.* The fact that a city has already exhausted its constitutional power to incur a debt, can not be shown to defeat a proceeding by it to improve a street by special assessment in part, and partly by general taxation. That question can not arise until the city seeks to borrow money or incur an indebtedness in that regard. *Jacksonville Ry. Co.* v. *City of Jacksonville*, 562.

POWER OF TAXATION.

6. *Constitutional limitation of taxing power to corporate purposes.* Section 5, article 9, of the constitution of 1848, providing that the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for *corporate* purposes, was a limitation upon the taxing power of the State, and under it taxation can not be imposed by such corporations except for corporate purposes. *Mather* v. *City of Ottawa*, 659.

MUNICIPAL AID.

7. *As to a merely private enterprise.* A municipal corporation is prohibited by that clause in the constitution from levying a tax in aid of a merely private enterprise, although the purpose may be one which will add to the wealth and prosperity of the municipality. Such a body can not incur a liability, and levy and collect taxes on the property of the citizen to aid in the development of mere private enterprises. Ibid. 659.

8. *Bonds in aid of that which was not a "corporate purpose."* In this case, bonds of the city of Ottawa were issued under an ordinance submitted to a vote of the people, and adopted thereby, which authorized the mayor to borrow, in the name of the city, the sum of $60,000, "for the use of said city, to be expended in developing the natural advantages of the city for manufacturing purposes," and provided for the issue of bonds therefor. The bonds, when issued, were given to an agent of a private corporation, to be by him expended in the improvement of the water-power upon certain rivers within the city, and he negotiated the same to a person then residing in the city: *Held*, that the bonds so issued were void for want of power in the corporate authorities to issue them, the purpose for which they were issued not being a corporate purpose. Ibid. 659.

DEFECTIVE STREETS AND SIDEWALKS.

9. *Duty and liability in respect thereto.* On principles of common law, an action lies against a municipal corporation, for damages resulting from its negligence in keeping public streets and sidewalks in repair, where the duty to make the repairs is fully declared, and adequate means are furnished the city to perform the duty. *City of Chicago* v. *Keefe, Admr.* 222.

MUNICIPAL CORPORATIONS.

DEFECTIVE STREETS AND SIDEWALKS. *Continued.*

10. A city incorporated under the general Incorporation law owes the duty of keeping its streets, sidewalks, etc., in repair, and is clothed with adequate powers and means for that purpose. *City of Chicago* v. *Keefe, Admr.* 222.

11. *As to the character of use of a street or sidewalk allowable, in view of the liability of the municipality.* The statute does not impose the duty upon incorporated cities to keep their streets and sidewalks in proper repair for travelers only, but for all persons lawfully using the same, without regard to the motives and objects of those passing over them. Persons using them for recreation or amusement not unlawful, or from mere idle curiosity, are as much within the protection of the law as those in the pursuit of their legitimate and necessary business. Ibid. 222.

SUNDAY ORDINANCE.

12. *Cities and villages organized under the general law—power to prohibit the keeping open places of buiness on Sunday.* Cities and villages incorporated under the general Incorporation act, by subdivision 66 of section 62, article 5, giving power "to regulate the police of the city or village, and pass and enforce all necessary police regulations," may pass an ordinance prohibiting persons from keeping open their places of business in such city or village, for the purpose of vending goods, wares and merchandise, on Sunday, and provide a penalty for a violation of the same. *McPherson* v. *Village of Chebanse*, 46.

13. *Whether ordinance inconsistent with Criminal Code—concurrent powers of municipal authorities and of the State.* The police regulations of a village may differ from those of the State upon the same subject, if they be not inconsistent therewith. A village ordinance prohibiting the keeping open of places of business on Sunday, for the sale of goods, etc., is not inconsistent with the provisions of section 261 of the Criminal Code. Ibid. 46.

WATER WORKS IN CITIES AND VILLAGES.

14. *Municipal powers in respect to their construction and maintenance—act of 1873, in its application to cities acting under special charters.* The act entitled "An act authorizing cities, incorporated towns and villages to construct and maintain water works," approved and in force April 13, 1873, applies to all cities, whether incorporated under special charters or under the general law, except in cities, towns or villages in which water works were at its passage managed and controlled by a board of public works. *Dutton* v. *City of Aurora et al.* 138.

15. The first section of that act, in giving cities, towns, etc., power to provide for a supply of water by the erection, construction and maintenance of a system of water works, leaves the municipal authorities unrestricted as to the character and cost or the means whereby the sup-

MUNICIPAL CORPORATIONS.

WATER WORKS IN CITIES AND VILLAGES. *Continued.*

ply of water shall be provided, and authorizes them to borrow money to the extent needed to make the contemplated improvement, and to this extent operates as a repeal of all limitations in their charters on their power of contracting indebtedness and borrowing money on bonds to be issued by them. *Dutton* v. *City of Aurora et al.* 138.

ORDINANCE.

16. *When it vests rights—right to repeal.* Where a village charter provides that ordinances shall not take effect until ten days after three copies thereof shall have been posted by the clerk, and that such posting shall be within thirty days after their adoption, no rights can be acquired under an ordinance vacating certain streets until such posting has taken place, and until ten days thereafter; and until this takes place, the ordinance may be repealed without depriving any one of any vested right. *Gormley* v. *Day*, 185.

17. *Residents of municipality chargeable with notice of the contents and purposes of its ordinances.* All residents of an incorporated city are chargeable with notice of the contents of all ordinances passed for the government and welfare of the city. So when an ordinance shows the purpose for which city bonds are issued, if a resident of the city buys them he will be held chargeable with notice of the purpose and object of their issue. *Mather* v. *City of Ottawa*, 659.

SPECIAL ASSESSMENT.

18. *Improvement of streets—necessity for an ordinance—requisites thereof.* See SPECIAL ASSESSMENT, 1 to 5.

SPECIAL TAXATION IN CITIES, ETC.

19. *For local improvements—whether the matter of benefits to be considered.* See TAXATION AND TAX TITLES, 1.

20. *Special taxation as distinguished from special assessment.* Same title, 2.

CITY ATTORNEY.

21. *His power in respect to an appeal—duty in respect to suits, and the presumption arising—validity of agreement to submit question of city's liability to arbitration.* See CITY ATTORNEY, 1.

FOREIGN INSURANCE COMPANY.

22. *Tax or license under acts of 1872 and 1879.* See INSURANCE, 13, 14.

VILLAGE CHARTER.

23. *When the court will take judicial notice of a special village charter.* See EVIDENCE, 1.

MUNICIPAL INDEBTEDNESS. See MUNICIPAL CORPORATIONS, 4, 5.

MURDER.

WHETHER MURDER OR MANSLAUGHTER.

As to the grade of the offence—the jury to determine, not the court. See CRIMINAL LAW, 3.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *Duty of railway to keep a flagman at a street crossing—as to persons not crossing the railroad, but walking along the track.* In a suit by a plaintiff, against a railway company, to recover for an injury received from a passing train at a public street crossing,—not in attempting to cross the track along the street, but while unlawfully walking along the track as a footway,—it was held error to instruct the jury that if the injury happened because of there being no flagman at the railroad crossing to give warning to those about to cross the street and railroad track of the approach of a train at the crossing, contrary to a city ordinance, then the plaintiff was entitled to recover. *Chicago, Rock Island and Pacific Ry. Co. et al.* v. *Eininger*, 79.

2. A requirement of a railway company to keep a flagman at a public street crossing in a large city, to give warning of the approach of trains, is intended for the protection of persons crossing the railroad tracks at such crossing, and not for the benefit of persons walking along the railroad track, employing it as a foot-path. To the latter the company does not owe the duty in respect to a flagman. Ibid. 79.

CONTRIBUTORY NEGLIGENCE.

3. *To whom a want of care may be imputed—as, in the case of a boy under age.* Where there is no evidence of the want of capacity or discretion in a minor plaintiff suing a railway company for a personal injury from negligence, and he is present at the trial, and it appears that he was of such age and ability to care for himself as to be trusted by his parents to attend school in a large city, a considerable distance from home, and to go and return by himself, it was held error to instruct the jury that if they believed, from the evidence, that the plaintiff, at the time and place of the injury, was of such tender years, and was so immature, that the requisite capacity to exercise proper care was wanting, then the law would not impute negligence to him. While the same degree of care might not have been required of him as from a person of mature years, it can not be said that no negligence could be attributed to him. Ibid. 79.

4. *Attempting to board a train while in motion.* In an action against a railway company to recover damages for a personal injury, on the ground of negligence, alleged to consist in not ringing a bell or sounding a whistle, in not having a flagman at the street crossing, and in running the train at a greater speed than six miles an hour, the company asked an instruction, based on evidence, as follows: "The jury are instructed,

NEGLIGENCE. CONTRIBUTORY NEGLIGENCE. *Continued.*

as a matter of law, that if, from the evidence, they believe that the injury to the plaintiff was caused by his attempting to climb upon the train in question while the same was in motion, then he is not entitled to recover." The court refused to give the instruction as asked, but modified it by inserting after the word "motion," the words, "and that he was injured in consequence of his own negligence," and gave it as modified: *Held*, that the court erred in refusing to give the instruction as asked, and in modifying the same. *Chicago, Rock Island and Pacific Ry. Co. et al.* v. *Eininger*, 79.

NEGLIGENCE AS A QUESTION OF FACT.

5. *Injury to child rolling hoop along defective sidewalk.* Whether a child ten and a half years old, who is injured while rolling a hoop along a sidewalk in consequence of its unsafe condition, was guilty of negligence on its part or not, is a question of fact, to be determined by the jury from all the evidence in the case, and not one of law, to be determined by the court. The law neither infers negligence, nor its absence, from the fact of the child rolling a hoop. *City of Chicago* v. *Keefe, Admr.* 222.

TWO CORPORATIONS ACTING TOGETHER.

6. *Death by negligence—when the servants of one corporation to be regarded as also the servants of the other.* In an action to recover for the death of the plaintiff's intestate, occasioned, as was alleged, by the wrongful act of the servants of the defendant company, a railway and transit company engaged in transferring, with its own motive power, trains of cars over the St. Louis bridge across the Mississippi river, it appeared this service was performed under a private arrangement between the defendant company and another corporation—the bridge company—for a compensation paid by the latter company, the two companies thus acting together in the transportation of passengers over the bridge, and in that regard there was concert of action between them. The collector of fares for the bridge company was on the trains crossing the bridge, by the consent, and certainly with the knowledge, of the defendant company, and it permitted that servant of the bridge company to control the movements of its trains. On the occasion in question, the plaintiff's intestate was a passenger on one of defendant's trains, and while the train was passing over one of the approaches to the bridge it was stopped in obedience to a signal given by the collector of fares for the bridge company, and by his direction the passenger was put off the train upon a trestle, from which he fell and was killed. It was *held*, as affecting the question of the liability of the defendant, that the collector of fares for the bridge company, while he was the servant of that company, was to be considered, for the time being, at least, and while so engaged on the train, as the servant of the defendant also. *Union Railway and Transit Co.* v. *Kallaher, Jr., Admr.* 325.

NEGLIGENCE. *Continued.*

INJURY FROM DEFECTIVE SIDEWALKS.

7. *Liability of the city—injury to child rolling hoop.* A city incorporated under the general law is liable in damages to the next of kin of a child, who, while rolling a hoop along a sidewalk out of repair, is injured in consequence of the defective state of the sidewalk, and who dies from such injury, when such child, at the time of the accident, was not guilty of negligence in failing to use the care for its safety required of one of its age, and when the city had notice of the unsafe condition of the walk before that time, or might have known its condition by ordinary care and diligence. And it makes no difference that such child was rolling a hoop at the time of the injury, when there is no ordinance prohibiting or regulating the rolling of hoops upon the sidewalks. *City of Chicago* v. *Keefe, Admr.* 222.

8. *Imputing negligence to a minor in the use of a sidewalk.* In determining whether a boy, a little over ten years of age, was or was not guilty of negligence in rolling a hoop over a defective sidewalk, where he is injured, all the circumstances in evidence, including his age, should be considered. If he exercised such care for his safety, as, under the circumstances, might be expected from one of his age and intelligence, it will be sufficient. Ibid. 222.

9. *Corporate duty and liability—in respect thereto—as to the character of use allowable.* See MUNICIPAL CORPORATIONS, 9, 10, 11.

AS BETWEEN MASTER AND SERVANT.

10. *Fellow-servants—injury to one from the negligence of another—liability of common master—burden of proof—negligence of master.* See MASTER AND SERVANT, 7 to 10.

11. *Negligence of master—injury to servant—liability, when servant takes the hazard of his employment.* Same title, 6.

ABSENCE OF COUNSEL PENDING TRIAL.

12. *Whether the defendant chargeable with negligence.* See NEW TRIAL, 1.

NEW TRIAL.

ABSENCE OF COUNSEL.

1. *Negligence.* On account of the sickness of defendant's counsel, the cause in which he was employed was set at the foot of the September calendar by consent, and after the death of the counsel so employed, the defendant employed other counsel in February following, who, supposing the cause was placed at the foot of the February calendar, in which case it would not be called for trial at that term, so informed the defendant, and directed him to wait for notice, and while such attorney was absent trying a cause in another county, the case was tried, and a verdict rendered against the defendant, and the court refused to set aside the verdict and allow a new trial: *Held*, that as the defendant was charge-

NEW TRIAL. ABSENCE OF COUNSEL. *Continued.*

able with some negligence, it could not be said the court abused its discretion in refusing to open the case and allow a new trial. *Walsh* v. *Walsh et al.* 655.

NONSUIT.

DIRECTING A NONSUIT. See PRACTICE, 4.

NOTICE.

UNDER THE RECORDING LAW.

1. *Notice of lien as to prior incumbrance — by recitals in deed.* Where a vendor of land states in his deed that it is subject to an indebtedness of his, naming the amount and to whom it is owing, and that the grantee, as a part of the consideration of his deed, assumes the payment thereof, such deed will create an express lien or charge on the land for a distinct portion of the purchase money; and the recording of the same will be notice of such lien to all persons claiming under the grantee. Such a lien will have all the efficacy of a mortgage. *Sidwell* v. *Wheaton*, 267.

ORDERS MADE IN PROGRESS OF CAUSE.

2. *To what extent parties are chargeable with notice thereof.* Parties are bound, at their peril, to take notice of all orders regularly made in the progress of a cause. So if the cause is placed upon the trial docket, it is the duty of the parties to be present when it is reached on the call for final disposition; and if they are not, in the absence of a reasonable excuse, they must suffer the consequences. *Cleaver* v. *Smith et al.* 114.

DISSOLUTION OF PARTNERSHIP.

3. *Of the notice required to protect retiring partner — mailing notice—presumption.* See PARTNERSHIP, 2, 3.

MUNICIPAL ORDINANCE.

4. *Inhabitants of municipality chargeable with notice of the contents and purposes of its ordinances.* See MUNICIPAL CORPORATIONS, 17.

ORDINANCE.

MUNICIPAL CORPORATIONS.

1. *Special assessment for improvement of street—necessity for an ordinance, and its requisites.* See SPECIAL ASSESSMENT, 1 to 5.

2. *Inhabitants of municipality chargeable with notice of the contents and purposes of its ordinances.* See MUNICIPAL CORPORATIONS, 17.

PARK COMMISSIONERS.

CONSIDERED AS A MUNICIPAL CORPORATION.

1. *Power to levy special assessments.* The West Chicago Park Commissioners are a *quasi* public corporation for park purposes, and as such have the power to take steps to cause property benefited by the establishment of a boulevard, to be specially assessed for the cost of the same. *Kedzie et al.* v. *West Chicago Park Commissioners*, 280.

2. *Effect of the act of 1873, as granting new powers, and of the mode of procedure under the several acts on the subject.* Section 12 of the act entitled "An act in regard to the completion, improvement and management of public parks and boulevards, and to provide a more efficient remedy for the collection of delinquent assessments," approved May 2, 1873, relates to a new and entirely different subject matter not provided in the original act relating to the West Chicago Park Commissioners, and invests them with powers they did not before have. Ibid. 280.

3. The language of that section, to the effect that the cost and expense of acquiring title to land for a connecting boulevard or pleasure way "shall be levied upon, and collected by special assessment upon, the property deemed specially benefited by the location of such boulevard or pleasure way, in the same manner as the cost of other lands for parks and boulevards is assessed, under the several acts creating such boards," means that the same shall be done by and through the same agencies or instrumentalities as were provided in such former acts. Section 4 of the act of May 2, 1873, does not compel action in pursuance of its terms in a proceeding under section 12, and does not repeal section 13 of the act of February 27, 1869. Ibid. 280.

PARTIES.

ENFORCING A TRUST.

1. *In favor of creditors—personal representations of a deceased creditor—heirs as representing debts due the ancestor—in equity.* A conveyance of land was made in trust, to secure certain creditors, one item of the indebtedness intended to be secured being described as a claim of the estate of S. Seven years afterward, certain other creditors secured, filed their bill against the trustee, to enforce the trust, making the unknown heirs of S. parties. No objection was made in the court below that the administrator or executor of S. was not made a party, but this objection was first made in the Appellate Court: *Held*, that it would be presumed the estate of S. was settled after so great a lapse of time, and that this part of the estate had vested in his heirs, in the absence of anything appearing to the contrary. In equity the title is treated as being where, in good conscience, it ought to be. *Rankin* v. *Barcroft & Co. et al.* 441.

2. After the settlement of an estate the heirs of the decedent will, in equity, be treated as the owners of any uncollected claim due the estate;

PARTIES. ENFORCING A TRUST. *Continued.*

and if they are made parties to litigation involving the collection of such claim, the debtor will be protected in making payment to them. *Rankin* v. *Barcroft & Co. et al.* 441.

ASSIGNMENT OF DOWER.

3. *Lands held in severalty—against whom dowress may proceed.* See DOWER, 5.

PARTITION.

BY AGREEMENT.

1. *Inequality of the division—estoppel.* Husband and wife agreed to divide a lot of ground so that the wife should receive one-third in value of the whole lot, and they each selected a third person, who made the division, which was satisfactory to them. In suit for partition the court confirmed this division, without regard to the exact value of the part set off to the wife: *Held*, that the husband, having acquiesced in the division as made, could not be heard to allege that the wife received more in value than one-third of the whole lot. *McDowell* v. *McDowell*, 255.

PARTNERSHIP.

INTEREST IN PROFITS.

1. *Whether a partnership.* A person may contract with a particular member of a firm for an interest in his share of the profits, without making himself a member of such firm and liable for its debts. *Meyer et al.* v. *Krohn et al.* 574.

DISSOLUTION.

2. *Of the notice required, to protect retiring partner.* As to persons who have never had any business transactions with a partnership firm, notice by publication in a newspaper published at the place of business of the firm, of its dissolution or the withdrawal of a member, is sufficient; but as to those who have had previous dealings with it, actual notice or its equivalent must be shown, to protect the retiring member from liability for debts subsequently incurred in the firm name. Ibid. 574.

3. *Mailing notice—presumption.* Proof of the mailing of notices of the dissolution of partnership and of the retirement of certain members thereof, properly addressed to persons having had prior dealings with the firm, is *prima facie* evidence that the notices have been received by the parties to whom they were addressed; but such presumption may be rebutted by proof that they were not received. Ibid. 574.

ACCOUNTING BETWEEN PARTNERS.

4. *How far assets of firm in hands of receiver are beyond control of parties—creditors obtaining priority over each other.* See RECEIVERS, 1 to 4.

PAYMENT.

TO ONE OF TWO PAYEES.

1. Payment to one of two joint payees extinguishes the debt. *Lyman* v. *Gedney*, 388.

SALE FOR CASH.

2. *Payment by check.* See SALES, 1.

PAYMENTS TO AN EXECUTOR.

3. *In money—not property.* See ADMINISTRATION OF ESTATES, 10, 11.

PLEADING.

OF THE DECLARATION.

1. *In personal action to recover taxes.* In an action of debt, to recover taxes due upon lands forfeited to the State, it is essential that the declaration allege the fact, not only that the defendant was the owner of the real estate against which the delinquent taxes are charged, but also the further substantive fact that he was such owner at the time such taxes became a charge against the real estate. A failure to allege these facts affords grounds for arresting the judgment. *Bowman* v. *The People*, 474.

PLEADING MATTERS OF EVIDENCE.

2. It is not proper for a pleader to plead mere matters of evidence in any case. *Zimmerman* v. *Willard et al.* 364.

ALLEGING FRAUD.

3. *Whether the pleader states a mere conclusion.* To an interpleader by an assignee for the benefit of creditors, filed in a suit by attachment against the assignor and another, who were sued as partners, claiming the property attached and the debts garnisheed as having passed under the assignment for creditors, the attaching creditor replied that the deed of assignment "was executed, made, had and contrived by the said grantor therein, of his fraud and covin, with the intent and purpose to delay, hinder and defraud his creditors," etc. The court sustained a demurrer to the replication: *Held*, that the replication was good in both substance and form. The pleading was not obnoxious to the objection that it stated the mere conclusion of the pleader, and not the facts constituting the fraud. The making of the deed of assignment, and the fraudulent intent, were the two facts essential to the defence, and they were distinctly averred. Ibid. 364.

EFFECT OF A TRAVERSE.

4. *As properly denying the allegations in a prior pleading, or, as amounting to an admission.* In an action against several as partners, where the plaintiff's replication to a plea denying the joint liability of one of the defendants as a partner, alleging that for two years prior to the contracting of the indebtedness sued on, such defendant was a partner, during which time plaintiff dealt with such firm and gave it credit, and that at the time the debt sued on was contracted in the firm name,

PLEADING. EFFECT OF A TRAVERSE. *Continued.*

the plaintiff had no notice that such defendant had ceased to be a member of the firm, a rejoinder traversing the allegations of the replication is good. But if the replication further alleges that at the time of contracting the debt sued on, the defendant so claiming to have retired from the firm, and one of his co-defendants, constituted one firm, and that such firm sued was composed of his firm and two others sued, the rejoinder will be bad, as admitting his joint liability. *Meyer et al.* v. *Krohn et al.* 574.

5. And where a replication to such a plea alleges that up to a day named the defendants were partners, and as such had dealings with the plaintiff, and that after that date he, without notice of the withdrawal of such defendants from the firm, gave the firm credit, and the defendants rejoin that at the time of making the promises they had ceased to be such partners, of which fact the plaintiff had notice, etc., this will, so far as the issue on such rejoinder is concerned, constitute an admission of record of the existence of the partnership up to the day and date named in the replication. Ibid. 574.

WAIVER OF DEMURRER.

6. *By pleading over.* A defendant, by answering a bill in chancery after the overruling of his demurrer thereto, waives his demurrer, except so far as he may have the same advantage on final hearing; and he can not assign for error the ruling upon the demurrer. *Gordon et al.* v. *Reynolds*, 118.

PLEADING SPECIALLY.

7. *Whether the plaintiff must declare specially.* Where the promise to pay money is a collateral undertaking, the declaration in an action for a failure to pay must be special; but when the promise is an original undertaking, a recovery may be had under the common counts. *Power* v. *Rankin*, 52.

8. So where the purchaser of a lot of corn gave a check for $1000 to the defendant, to be held until corn to that amount was delivered, and then paid to the seller, and a party holding a chattel mortgage on the corn would not consent to its delivery until the defendant agreed and promised to pay the same to him, it was *held*, that the mortgagee to whom the promise was made might recover the $1000, under the common counts, after the delivery of the corn, such promise being regarded as an original undertaking, as distinguished from one that is merely collateral. Ibid. 52.

9. *Statute of Frauds should be specially pleaded.* The Statute of Frauds can not be relied on as a defence, in any case, unless insisted upon by plea or answer. Without it is thus interposed, a trust resting in parol will be enforced the same as if it was in writing. *Gordon et al.* v. *Reynolds*, 118.

DEFECT IN PLEADING.

10. *Cured after verdict.* See AMENDMENTS AND JEOFAILS, 8, 9.

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS.

1. *In cases in chancery.* The rule in equity is, that the proofs must correspond with the allegations of the bill, and be responsive thereto. But a variance not substantial will not be fatal. *Kidder* v. *Vandersloot*, 133.

2. So where a party, to secure a loan of $2500, conveyed to the lender eighty acres of land as a security, taking back a written agreement for a reconveyance on payment of the principal, and $270 for each year of the credit given, but it was alleged in the bill to foreclose that the mortgagor was to pay $250 a year as rent for the land, and the taxes thereon, and it appeared that $20 of the yearly payment was for the payment of the taxes, and $250 for interest, it was *held*, that there was no substantial variance. Ibid. 133.

MANDAMUS.

3. *Of the petition — necessary averments — posting village ordinances — allegata and probata must agree.* See MANDAMUS, 1, 2, 3.

POLICE POWERS.

MUNICIPAL CORPORATIONS.

Cities and villages organized under the general law — extent as to subject matter of police powers. See MUNICIPAL CORPORATIONS, 3.

POSSESSION.

PROPERTY IN HANDS OF RECEIVER.

1. *Receiver's possession is the custody of the law — not disturbed without consent of court appointing him.* See RECEIVERS, 1 to 4.

POSSESSION OF LAND.

2. *How acquired by purchaser at sale of lands to pay debts.* See ADMINISTRATION OF ESTATES, 9.

3. *Power of a court of equity to give possession of land — exceptions to the general rule.* See CHANCERY, 19, 20.

4. *Specific performance — verbal promise to procure title and convey land — making improvements without possession under the contract — Statute of Frauds.* See CHANCERY, 27, 28, 29.

PRACTICE.

TIME TO OBJECT, ETC.

1. *That evidence is not admissible under the pleadings.* If a declaration contains no averment to authorize the admission of evidence to prove a particular fact, objection should be specifically made to the introduction of such evidence at the time it is offered, so that the objection may be obviated by an amendment of the declaration. If not so made the objection will be deemed to have been waived. *Ladd* v. *Pigott*, 647.

PRACTICE. TIME TO OBJECT, ETC. *Continued.*

2. *How and when to avail of error in the ruling of the trial court—by exception, motion in arrest, or for a new trial.* Where the *ad damnum* laid in the original declaration was $3000, but in the amended declaration it was laid at $1000, and the affidavit to hold to bail stated the indebtedness to be $2578.75, for which sum the court assessed the plaintiff's damages and rendered judgment, there being no exception taken, and no motion made in arrest or for a new trial, it was *held*, that as the error might have been obviated by amendment, if pointed out and insisted upon in the trial court, it afforded no ground of reversal. *Utter et al.* v. *Jaffray & Co.* 470.

3. Where a cause is tried by the court without a jury, if the court assesses the plaintiff's damages in excess of the *ad damnum* in the declaration, the defendant must except to the finding, or take advantage of the error by motion in arrest or for a new trial in the trial court, before he can make the objection in an appellate court. Ibid. 470.

DIRECTING A NONSUIT.

4. Where there is evidence tending to prove the averments of the declaration put in issue, a motion for a nonsuit will be properly refused. *Ladd* v. *Pigott*, 647.

SECOND TRIAL.

5. *While a former verdict is still pending.* In 1881 a verdict was rendered in a cause in favor of the plaintiff, and afterward, in 1884, without its being set aside, another jury was called which rendered a verdict for the same amount in favor of the plaintiff, upon which judgment was rendered: *Held*, that as a mere verdict could do the defendant no harm, and as the court would render but one judgment, the irregularity worked no injury. *Walsh* v. *Walsh et al.* 655.

IN SUPERIOR COURT OF COOK COUNTY.

6. *Hearing before different judges in the same case.* A cause being called for trial in the Superior Court of Cook county, the presiding judge transferred the same into the branch of that court held by another judge, where it was tried, and a motion made by the defendant to set aside the verdict and allow him to defend. The judge of the branch court refused to consider the motion in respect to the regularity of the call in the other court and of the transfer, and directed the parties to appear before the other judge in respect to that matter, who overruled the motion in respect to the matters in his court, and on a further hearing the judge to whom the cause had been transferred, overruled the motion on the merits: *Held*, that there was no error in each judge passing upon so much of the proceeding as took place before him, and in the final overruling of the motion by the judge who tried the case. Ibid. 655.

AMENDMENT OF THE RECORD.

7. *Allowable during the term.* See AMENDMENTS AND JEOFAILS, 6.

PRACTICE. *Continued.*

QUO WARRANTO.

8. *Proceedings on the relation of the Auditor—against insurance company—leave to file information without a rule nisi—proceedings after leave granted.* See QUO WARRANTO.

PRACTICE IN THE SUPREME COURT.

RECORD FILED IN WRONG COURT.

1. Where an appeal was allowed to the Appellate Court upon condition of filing a bond within a given time, which was done, and the transcript of the record was filed in this court, and there was no joinder in error or appearance by the other party, so that the cause could be treated as a writ of error, there being no appeal for this court to act on, the case was stricken from the docket. *Gage* v. *Arndt*, 318.

WHAT MAY BE ASSIGNED AS ERROR.

2. *Ruling affecting interests of parties not complaining.* On the appeal of one of several defendants, only, from a decree in partition, this court may refuse to consider a ruling as to the interests of other defendants not joining in the appeal and taking no steps to have the decree as to them reversed. A party can not assign for error that which does not prejudice his or her rights. *Ransom* v. *Henderson et al.* 528.

3. *As to matters favorable to adverse party.* A party can not assign for error the exclusion of evidence offered by him, which, if admitted, would establish the issue in favor of his adversary. *Meyer et al.* v. *Krohn et al.* 574.

4. *Trial by the court—when its finding can not be assigned as error.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 2.

ERROR WILL NOT ALWAYS REVERSE.

5. *Ruling that a good pleading is bad, when there are issues on other pleadings equally availing.* It is sufficient in any case that there is one issue under which a given defence may be proved. Therefore a reversal will not be given for sustaining a demurrer to a good plea or replication, where the evidence is admissible, and has been heard under some other issue. *Zimmerman* v. *Willard et al.* 364.

6. And where all matters set up in special pleas are available in defence under the general issue, an error in sustaining a demurrer to the special pleas will not require a reversal of the judgment. *Walsh* v. *Walsh et al.* 655.

7. *As to admission of evidence.* The admission of parol evidence which may vary or change the terms of a written contract, when the party introducing the same obtains no relief whatever on the contract, is an error working no harm, and no ground of reversal. *McDowell* v. *McDowell*, 255.

8. *Refusal of instruction.* The refusal of a proper instruction in respect to certain evidence will not be such material error as to require a

PRACTICE IN THE SUPREME COURT.

ERROR WILL NOT ALWAYS REVERSE. *Continued.*

reversal, when, from all the evidence, the finding must have been the same had it been given. *Crain et al.* v. *First National Bank of Jacksonville*, 516.

9. *Variance—decree without amending bill.* A bill by a vendor of land for a specific performance of the contract, alleged that the complainant was seized in fee of the premises which he agreed to convey, subject to the payment of a mortgage indebtedness in the agreement mentioned, and the taxes, and that they were free of all other incumbrances. The agreement described the indebtedness as "a certain mortgage in favor of G. R. and A. K., given to secure the sum of $4000," etc., and the deed tendered described the mortgage in the same way. The evidence showed the existence of a mortgage to A. K., to secure $2500, due in four years, and $1500, due in three years. The decree found the mortgage debt correctly: *Held*, that the complainant technically should have amended his bill, averring the mistake in the description of the mortgage assumed; but as the correct amount of the incumbrance appeared both in the pleadings and proof, the error was not of such importance as to justify a reversal of the decree. *Lyman* v. *Gedney*, 388.

10. *Self-defence—as to instructions.* An instruction given on the trial of a person upon the charge of murder, upon the law of self-defence, against the defendant, though abstractly erroneous may not afford a ground for a reversal of a judgment of conviction, where no case of self-defence is shown by the evidence. *Panton* v. *The People*, 505.

VACATING JUDGMENT.

11. *Entered under misapprehension of fact.* Where a judgment of this court is entered in vacation, reversing the judgment of the Appellate Court inadvertently, and upon a misapprehension of the facts shown by the record, it will, on its own motion, vacate such judgment and cause the proper one to be entered. *Stafford* v. *Chicago, Burlington and Quincy Railroad Co.* 244.

PRECEPT. See TAXATION AND TAX TITLES, 6, 7.

PRESUMPTIONS.

OF LAW AND FACT.

1. *Legality of marriage—presumptions in respect thereto—long continued absence of former husband.* See MARRIAGE, 1 to 4.

2. *Death of absent person—presumption from long continued absence—evidence.* See DEATH, 1, 2, 3.

3. *Deed of conveyance from a firm—presumption as to whether by all its members.* See CONVEYANCES, 3.

PRESUMPTIONS. *Continued.*

4. *Presumption to sustain a judgment.* On an issue of fact as to the giving of notice of the dissolution of a firm, where the evidence of the defendants shows the mailing of such notice to the plaintiff, properly addressed, and that of the plaintiff that it never was received, and the jury find for the plaintiff, it will be presumed in favor of the judgment below that the jury found, as matter of fact, that such notice was never received. *Meyer et al.* v. *Krohn et al.* 574.

PRINCIPAL AND AGENT.

RATIFICATION.

By principal of acts of agent. See AGENCY, 3.

PROBATE OF WILLS. See WILLS, 1 to 4.

PROMISSORY NOTES.

LIMITATION ACT OF 1872.

1. *Effect as to note given prior to that time—limitation sixteen years.* See LIMITATIONS, 5.

CONSIDERATION.

2. *Note intended as a gift—not recoverable at law.* See CONSIDERATION, 1.

PUBLIC PROPERTY.

OF THE SALE THEREOF.

1. *As to the power of legislature to sell public property.* In the absence of constitutional restriction the legislature may authorize public property, or property held by the State, to be sold and conveyed to private individuals, where no trust in favor of private individuals stands in the way. *Lyman* v. *Gedney*, 388.

2. *When private rights prevent sale of public property.* Where a private individual conveys property to the public for a specified use, or where the public authorities plat and lay off grounds as dedicated to a public use, and sell other adjacent property on the faith of such public use remaining, and in consideration of its benefits to the property sold, it seems that such property so dedicated to the public can not afterwards be sold to private persons, to the detriment of those who purchased in consideration of the donation. But a person buying a lot around a public square after the sale of one or more lots therein, can not be heard to complain, nor can any one else, after the lapse of fifty years. Ibid. 388.

3. Although it may have been once doubtful as to the right of county commissioners to sell a portion of the lots in a block marked "public square," yet if such a sale is acquiesced in by the public authorities and private persons interested, for the period of fifty years, all persons will be estopped to question the validity of such sales as against the private rights of those claiming under the purchase. Ibid. 388.

PURCHASER. See VENDOR AND PURCHASER.

QUO WARRANTO.

WHETHER A PUBLIC OR PRIVATE PROSECUTION.

1. *The Auditor against an insurance company.* The Auditor of Public Accounts is given, by statute, supervision over life as well as other insurance companies; and when companies assume to insure without having sufficient legal authority, it is within the line of his duty to cause them to be prosecuted, and to be deprived of their assumed franchises. An information in the nature of a *quo warranto*, filed by the Attorney General on the relation of the Auditor, against a private corporation assuming to insure, is not a private but a public prosecution. In this regard, such a case is not analogous to that of *The People ex rel.* v. *North Chicago Ry. Co.* 88 Ill. 538. There the application was by a private party to file an information, while here it is by the Attorney General, at the instance of the Auditor of Public Accounts, in the performance of his duties as a public officer. *People ex rel. Swigert* v. *Golden Rule et al.* 34.

LEAVE TO FILE INFORMATION.

2. *Without a rule nisi.* Under the present statute the court, or judge thereof in vacation, may act upon the petition of the relator for leave to file an information in the nature of a *quo warranto*, without first laying a rule upon the respondents to show cause against granting the leave, and, if satisfied that there are probable grounds for the filing of the petition, allow it to be filed. Ibid. 34.

PROCEEDINGS AFTER LEAVE GRANTED.

3. *Power of the court to vacate the order granting leave—upon what grounds.* Where a circuit court, in term time, allows an information in the nature of a *quo warranto* to be filed, and orders a summons to be issued, the discretionary powers of the court are exhausted, and the issues of fact or of law presented by the pleadings must then be tried. If the information is insufficient, the respondents should demur, otherwise they should, by plea, set up any defence they may have. Ibid. 34.

4. If leave to file the information is granted, and an order made by the court for the issue of summons, upon a misapprehension of some fact material to be known before making such order, but for the supposed existence of which it would not have been made, it is competent for the court to vacate the order at any time during the term at which it is made. Ibid. 34.

5. Where the court has, on a proper affidavit showing probable cause, granted leave for the filing of an information by the Attorney General, it will be error to vacate the order granting leave for reasons or grounds which should be interposed as a defence on the final hearing. Ibid. 34.

RATIFICATION.

BY PRINCIPAL.

Of acts of agent. See AGENCY, 3.

REASONABLE DOUBT. See CRIMINAL LAW, 7.

RECEIVERS.

PROPERTY IN HANDS OF RECEIVER.

1. *How far assets in the hands of a receiver are beyond the control of the parties, or of creditors—and herein, of creditors obtaining priority over each other.* The possession of a receiver, as an officer of the court, is the custody of the law, and he holds the property or funds for the benefit of the party or parties whom the court shall find entitled thereto; and the law will not permit the receiver's possession to be disturbed, without the consent of the court that first obtained jurisdiction to appoint him. *Jackson et al.* v. *Lakee*, 287.

2. Where a receiver has been appointed on a bill filed by one partner against his co-partner, merely to hold the property or funds pending the litigation between the parties, creditors of the firm are not bound to wait till the equities between the parties may be adjusted, as that might never be done. In such case the assets are treated as still belonging to the firm, and creditors may proceed in any lawful way to acquire a lien entitling them to priority over less diligent creditors. Ibid. 287.

3. A receiver was appointed on bill filed by one partner against the other for the settlement and adjustment of the partnership accounts and the payment of creditors of the firm, which was insolvent, and the court had ordered notice to be given to all creditors to come in and prove their debts before the master. It was *held*, that one of the creditors, by the recovery of a judgment against the firm during the pendency of said bill, and the filing of a creditor's bill on the same day that notice to creditors was ordered, did not acquire any lien upon the assets in the hands of the receiver, or right to be preferred over other creditors,—and this more especially when such creditor proved his claim before the master, and shared in the distribution of the funds in his hands. Ibid. 287.

4. And where, in such case, the defendant partner appeared, and consented to the appointment of a receiver, who took possession of all the effects of the firm; it was *held*, that this was equivalent to placing the assets of the firm, by the voluntary act of the parties, under the control of the court for the benefit of their creditors, generally, and that after the court had assumed jurisdiction the parties would not have been allowed to dismiss the suit. Ibid. 287.

5. *Estoppel of creditor to claim priority, inconsistently with former acts.* Where a creditor of a firm obtained judgment after the appointment of a receiver, on a bill between the partners, and proved his judgment before the master in pursuance of an order of the court authorizing the same, and filed his petition to prevent the partners from dismissing their suit and discharging the receiver, and contested other claims presented before the master, and received his *pro rata* share of a dividend ordered to be paid by the receiver, it was *held*, that these acts estopped

RECEIVERS. PROPERTY IN HANDS OF RECEIVER. *Continued.*

such judgment creditor from claiming priority over other creditors in the final distribution of the assets. *Jackson et al.* v. *Lake*, 287.

6. *Not subject to execution or garnishment.* See LIENS, 2.

RECORDING LAW.

NOTICE OF LIEN.

As to a prior incumbrance—by recitals in a recorded deed. See NOTICE, 1.

REDEMPTION FROM TAX SALE. See TAXATION AND TAX TITLES, 11, 12.

RELEASE OF DOWER. See DOWER, 6, 7; CONVEYANCES, 1.

REMEDIES.

LIABILITY OF STOCKHOLDERS.

Enforcement in chancery—to the exclusion of the remedy at law. See CHANCERY, 21, 22, 23.

REPEAL OF STATUTES. See STATUTES, 4, 5.

RESCISSION OF CONTRACTS. See CONTRACTS, 6.

RESULTING TRUST. See TRUSTS AND TRUSTEES, 6 to 9.

REVOCATION.

OF LETTERS OF ADMINISTRATION.

1. *On finding a will—as to acts prior to the revocation.* See ADMINISTRATION OF ESTATES, 1.

OF A GIFT.

2. *Its revocation.* See GIFT, 1.

RIPARIAN OWNERS.

ACCRETIONS—LANDS BORDERING ON RIVER.

The rule of adjustment between adjacent riparian owners, as to accretions. See ACCRETIONS, 1.

SALES.

SALE FOR CASH.

1. *Whether complete before actual payment—payment by check.* Where a contract is made for the sale of grain at a warehouse, for cash, the purchaser will not be entitled to possession before payment of the price; and a check given by him on a bank for the price, which is dishonored, is no payment, and he acquires no title to the grain by giving such worthless check. *Peoria and Pekin Union Ry. Co.* v. *Buckley et al.* 337.

SALES. *Continued.*

SALE OF PUBLIC PROPERTY.

2. *As to the power of the legislature to authorize its sale.* See PUBLIC PROPERTY, 1.

3. *When private rights will prevent its sale—sale by county commissioners—acquiescence by the public and by private persons—estoppel.* Same title, 2, 3.

TAX SALES.

4. *Sale for taxes pending an appeal.* See TAXATION AND TAX TITLES, 4.

SETTING ASIDE TAX SALE.

5. *Upon terms.* Same title, 5.

SATISFACTION OF JUDGMENT.

BY ATTORNEY OF RECORD. See JUDGMENTS, 3.

SATISFACTION OF MORTGAGE.

TWO JOINT MORTGAGEES.

One of two joint mortgagees, to whom payment is made, may enter satisfaction. See MORTGAGES AND DEEDS OF TRUST, 2.

SELF-DEFENCE. See CRIMINAL LAW, 6.

SET-OFF.

IN CHANCERY.

Unliquidated damages against a judgment—when denied. See CHANCERY, 4.

SPECIAL ASSESSMENTS.

IMPROVEMENT OF STREET.

1. *Necessity for an ordinance—and requisites thereof.* A valid ordinance is essential to proceedings by special assessment for the improvement of a street by a city. If the ordinance is invalid, a judgment confirming an assessment on property is not authorized. *Jacksonville Ry. Co.* v. *City of Jacksonville*, 562.

2. An ordinance for the improvement of a public street, the cost of which is to be assessed, in whole or in part, upon abutting property, must specify the nature, character, locality and description of the proposed improvement. Ibid. 562.

3. An ordinance for paving a street partly by special assessment and the residue by general taxation, required the pavement to be what is known as the "Bloomington brick pavement," and the foundation thereof to be laid of cinders, sand, gravel, or other materials equally suitable, at least six inches deep, etc. The estimate of its cost, approved by the city

SPECIAL ASSESSMENTS. IMPROVEMENT OF STREET. *Continued.*

council, showed that cinders were to be used. It was *held*, the ordinance was not obnoxious to the objection of uncertainty as to the materials to be used for the brick to rest upon. In such case the words, "or other materials," etc., may be treated as surplusage. *Jacksonville Ry. Co.* v. *City of Jacksonville*, 562.

4. An ordinance for the paving of a street is not void for uncertainty, because it requires the brick pavement to be laid upon a foundation of sand, gravel or cinders. Ibid. 562.

5. Nor is such an ordinance rendered invalid by a provision requiring all the work done and materials used to be subject to the approval of the city engineer, and in accordance with the plans and specifications to be furnished by the city council. Such provision does not give him the power to determine the kind of materials to be used, but only the right to see that the materials required are used, and the work done as directed by the ordinance. Ibid. 562.

PARK COMMISSIONERS.

6. *Power of West Chicago Park Commissioners to levy special assessments—acts of 1869 and 1873 construed—grant of new powers—mode of procedure.* See PARK COMMISSIONERS, 1, 2, 3.

FORMER ADJUDICATION.

7. *As to judgment of confirmation of special assessment.* See FORMER ADJUDICATION, 3.

SPECIAL ASSESSMENT.

8. *As distinguished from special taxation.* See TAXATION AND TAX TITLES, 2.

SPECIAL TAXATION.

FOR LOCAL IMPROVEMENTS. See TAXATION AND TAX TITLES, 1, 2, 3.

SPECIFIC PERFORMANCE. See CHANCERY, 26 to 34.

STATUTES.

CONSTRUCTION OF STATUTES.

1. *Whether to give a retroactive effect, or only prospective.* As a general rule a statute is construed so that it shall operate *in futuro* only, and not to affect past transactions. If the real design is left doubtful, the statute will be construed so as to have only a prospective operation. *Means et al.* v. *Harrison, Exr.* 248.

2. *Not to conflict with the common law.* Statutes should be construed in reference to the principles of the common law; and it will not be presumed the legislature intended to make any innovation upon the common law further than the case absolutely requires, or further than that specified or clearly implied. *Smith et al.* v. *Laatsch et al.* 271.

STATUTES. CONSTRUCTION OF STATUTES. *Continued.*

3. *The naming of particular things as excluding all others.* The introduction of an exception as to the operation of a general statute is necessarily exclusive of all other independent extrinsic exceptions. *Dutton* v. *City of Aurora et al.* 138.

REPEAL OF STATUTES.

4. *Repeal by implication.* Where the provisions of a former and a later statute are inconsistent and repugnant in respect to the same subject matter, the later statute is a repeal of the former to the extent of the inconsistency or repugnancy. Ibid. 138.

5. So where a city, by its special charter, is limited in borrowing money to a sum not exceeding $5000 in any one year, for which it may issue its bonds, but a subsequent general law gives all incorporated cities, etc., power to construct water works, without limit as to the cost, and to borrow money for such purpose on its bonds, the general law will operate to repeal the provisions in the charter only in respect to indebtedness and borrowing of money for constructing and maintaining a system of water works, leaving the limitations in the charter in force as to the contracting of indebtedness for other purposes. Ibid. 138.

STATUTES CONSTRUED.

6. *Actions "sounding in damages"—what cases included—reviewing judgment of Appellate Court.* Section 8 of the Appellate Court act construed in *Bradshaw* v. *Standard Oil Co.* 172. See APPEALS AND WRITS OF ERROR, 10, 11.

7. *Advancement by father to son—death of son in lifetime of father—rights of children of the son.* Section 4 of the act of 1872, in regard to the descent of property, construed in *Simpson et al.* v. *Simpson et al.* 603. See ADVANCEMENT, 2.

8. *Assignment for the benefit of creditors—deed of assignment—place where acknowledged—comma after the word "acknowledged."* The first section of the Assignment act of 1877, construed in *Zimmerman* v. *Willard et al.* 364. See INSOLVENT DEBTORS, 1.

9. *Ejectment—title derived from common source.* Section 25 of the Ejectment act of 1872, construed in *Smith et al.* v. *Laatsch et al.* 271. See EJECTMENT, 3.

10. *Foreign insurance companies—tax or license by cities and villages—under acts of 1872 and 1879.* Section 110 of the act of 1872, as effected by section 30, chapter 73, passed in 1879, construed in *City of Chicago* v. *James*, 479. See INSURANCE, 13, 14.

11. *Garnishment—property attached and fund garnisheed—for whose benefit held.* Section 37 of the Attachment act, construed in *National Bank of America* v. *Indiana Banking Co.* 483. See GARNISHMENT, 1.

STATUTES. STATUTES CONSTRUED. *Continued.*

12. *Limitation act of April 4, 1872—effect of act as to note given prior to that time.* Act construed in *Means et al.* v. *Harrison, Exr.* 248. See LIMITATIONS, 5.

13. *Sunday ordinance—cities and villages organized under the general law—power to prohibit by ordinance the keeping open of places of business on Sunday—extent as to subject matter of police powers.* Subdivision 66 of section 62, article 5, of the general law, vests cities and villages with power to prohibit, by ordinance, persons from keeping open their places of business, for the vending of wares, on Sunday. The police powers of the city or village council may extend to and embrace a subject matter of police regulation, under the general police power of the State. See MUNICIPAL CORPORATIONS, 12, 13.

14. *Water works in cities and villages—municipal powers in respect to their construction and maintenance—act of April 13, 1873, in its application to cities acting under special charters.* Act construed in *Dutton* v. *City of Aurora et al.* 138. See MUNICIPAL CORPORATIONS, 14, 15.

15. *West Chicago Park Commissioners—power to levy special assessments—grant of new powers—mode of procedure.* The acts of February 27, 1869, and May 2, 1873, construed in *Kedzie et al.* v. *West Chicago Park Commissioners*, 280. See PARK COMMISSIONERS, 1, 2, 3.

STATUTE OF FRAUDS.

PROMISE TO PAY DEBT OF ANOTHER.

1. *Of a new consideration—surrendering an existing security.* Where the moving consideration for the promise to pay money is the liability of a third person, the promise must be in writing; but if there is a new consideration moving from the promisee to the promisor, then the superadded consideration makes it a new agreement, which is not within the Statute of Frauds. *Power* v. *Rankin*, 52.

2. So where a party having a chattel mortgage upon a lot of corn, to secure a note of some $1200, relinquishes the same, and allows the corn to be sold and delivered by his debtor, in consideration that an agent, in whose hands $1000 was placed, had agreed to pay him that sum when the corn should be delivered, it was *held*, that the verbal promise to pay the holder of the chattel mortgage was not within the Statute of Frauds, and that an action would lie for a failure to make the payment. Ibid. 52.

TRUST IN PAROL.

3. An express trust between the grantor and grantee of land, that the grantee is to hold the land in trust for the grantor, or is to reconvey to him in a certain contingency, is invalid, under the Statute of Frauds, unless evidenced by some writing signed by the grantee. *Stevenson* v. *Crapnell et al.* 19.

STATUTE OF FRAUDS. *Continued.*

SPECIFIC PERFORMANCE.

4. *Verbal promise to procure title and convey land—making improvements without possession, under the contract.* See CHANCERY, 27, 28, 29.

PLEADING.

5. *Should be specially pleaded.* See PLEADING, 9.

STOCKHOLDERS.

LIABILITY FOR DEBTS OF CORPORATION.

Remedy in chancery. See CHANCERY, 21, 22, 23.

SUBROGATION.

TRUSTEE OR DEBTOR PAYING PREFERRED DEBT. See MORTGAGES AND DEEDS OF TRUST, 5.

SUNDAY ORDINANCE.

MUNICIPAL CORPORATIONS.

Cities and villages organized under the general law—power to prohibit the keeping open places of business on Sunday—whether inconsistent with Criminal Code. See MUNICIPAL CORPORATIONS, 12, 13.

SUPERIOR COURT OF COOK COUNTY.

PRACTICE.

Hearing before different judges in the same case. See PRACTICE, 6.

SURETY.

PRINCIPAL AND SURETY.

1. *Right of the latter to require indemnity or further security from the former.* A surety of a trustee can not maintain a bill in equity to require his principal to give other and additional securities upon his bond given to secure the *cestuis que trust*, or counter security, and on his failure to give such security, have him removed. *Ridgeway* v. *Potter*, 457.

2. The contract created by law between a principal and surety is, that the former shall refund to the latter whatever the surety has to pay for him. The principal is under no legal duty to a surety to keep his co-sureties in equal solvency as they were when they first became such, or to keep any co-sureties to share in the liability. Ibid. 457.

3. Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the principal to discharge the debt for which the surety is responsible; and it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal. Ibid. 457.

TAXATION AND TAX TITLES.

MUNICIPAL TAXATION.

1. *Special taxation for local improvements—whether the matter of benefits to be considered.* The power of special taxation of contiguous property for the making of local improvements by a city, does not depend upon the fact of an equivalent benefit to the property taxed. The power is given unqualifiedly, with no restriction as to the benefiting of contiguous property. *City of Galesburg* v. *Searles et al.* 217.

2. *Special taxation as distinguished from special assessment.* An ordinance was passed for the construction of a sewer in a street, the cost thereof to be paid, one-half by general tax, and one-half by special taxation, to be levied on the property contiguous to the improvement in proportion to the benefits accruing to the respective parcels of land or lots along the line of the sewer by the making thereof, to be levied and collected as provided by article 9 of the act of the legislature entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, and a committee was appointed, who reported the estimated cost of the proposed improvement: *Held*, that this was a case of proceeding by special taxation, and not by special assessment. Ibid. 217.

3. *Committee to ascertain the cost of improvement—at what stage of the proceeding to be appointed.* It is no valid objection to a proceeding to construct a sewer, one-half of the cost thereof to be paid by general tax and the other half by special taxation of contiguous property, that the committee to estimate the cost of the improvement may have been appointed after the passage of the ordinance and before its approval by the mayor. It is sufficient if the ordinance is signed before the petition is filed in the county court to have the tax levied for half the estimated cost upon contiguous property. Ibid. 217.

SALE FOR TAXES.

4. *Pending an appeal.* Where an appeal is taken by the People from the judgment of the county court against lands for taxes, all proceedings under the judgment are thereby suspended until the appeal is disposed of, and a sale of the land pending such appeal will be without authority of law, and void. *Crane, Jr.* v. *Peacock*, 347.

SETTING ASIDE TAX SALE.

5. *Upon terms.* A lot was sold for the taxes thereon, by the description of "lot 9, in block 107," when it should have been described as "lot 9, in blocks 106 and 107," of a subdivision, which was chargeable with taxes: *Held*, that a court of equity, in setting aside such sale, properly required the owner to pay the sum paid for it by the purchaser at the sale, and six per cent interest thereon, as a condition of granting the relief sought. Ibid. 347.

TAX DEED—PRECEPT.

6. *Whether a precept must be shown in support of a tax deed—since the amendment of 1879.* Prior to the amendment of the Revenue law

TAXATION AND TAX TITLES. TAX DEED—PRECEPT. *Continued.*

of 1879, the failure to produce in evidence a precept, was fatal to a tax title; but since that amendment, making the tax deed *prima facie* evidence of the regularity of the proceedings, it is not necessary, in the first instance, for the party claiming title under the tax sale to produce such precept. It is sufficient that he gives in evidence his tax deed. *Ransom* v. *Henderson et al.* 528.

7. The production of a tax deed regular on its face, affords *prima facie* evidence "that the sale was conducted in the manner required by law;" but such *prima facie* case may be rebutted by evidence showing there was in fact no valid precept, or that the sale was not conducted according to law. Ibid. 528.

WHO SHALL PAY TAXES.

8. *Duty of dowress as to the payment of taxes—effect of non-payment as working a forfeiture, as for waste.* See DOWER, 11, 12, 13.

PERSONAL ACTION TO RECOVER.

9. *Of the declaration—essential allegations.* See PLEADING, 1.

JUDGMENT FOR TAXES.

10. *How far conclusive as to legality of taxes.* See JUDGMENTS, 2.

REDEMPTION FROM TAX SALE.

11. *Under the statute—upon what terms—and within what time.* The statute, except as to persons under disability, makes no provision for redemption after the expiration of two years from a sale of land for taxes. Where the redemption is made after that time by one under a disability, he is required to pay ten per cent on double the amount of the sale from and after the expiration of such two years. *Gage* v. *Busse et al.* 589.

12. *In equity.* Where a court of equity allows a redemption from a sale of land for taxes, on the ground that the amount of the sale includes illegal taxes, the party redeeming will be required to pay the redemption money allowed by the statute on the amount of the legal taxes and costs, and six per cent upon the redemption money from the expiration of the time for redemption fixed by the statute, and all taxes paid by the purchaser after the two years allowed for redemption, with six per cent thereon. Ibid. 589.

TENANCY AT SUFFERANCE. See LANDLORD AND TENANT, 2.

TENDER.

ON BILL TO DECLARE A TRUST.

1. Where the object of a bill is not to redeem from a trust, but to declare and enforce the same, the defendant holding the title to land in trust to indemnify himself from liability in respect to the purchase money, there is no necessity to allege or prove a tender. It is sufficient to allege a readiness and willingness on the part of the complainant to pay the obligations on which the defendant is liable. *Powell* v. *Powell*, 329.

TENDER. *Continued.*

SPECIFIC PERFORMANCE.

2. *Tender of deed, when rendered unnecessary.* See CHANCERY, 33.

MUTUAL BENEFIT ASSOCIATION.

3. *Tender of annual special assessment—forfeiture of membership—notice.* See INSURANCE, 1.

TOWN ELECTIONS. See ELECTIONS, 1 to 6.

TOWN PLATS.

DEDICATION.

As to block marked "public square." See DEDICATION, 1.

TRIAL DE NOVO.

ON APPEAL.

Effect as vacating judgment appealed from. See APPEALS AND WRITS OF ERROR, 16.

TRUSTS AND TRUSTEES.

WHETHER A TRUST EXISTS.

1. *Sufficiency of evidence to show land was bought for another under verbal contract.* Where a person, after taking possession of land under a contract of purchase, by which he is not required to pay the contract price unless his vendor shall acquire the title to the same within three years, purchases from others the superior title, under which he claims the property as his own, in order to show that his subsequent purchase of the title was for his original vendor under a verbal contract to that effect, it is incumbent on the party claiming the trust to establish the existence of such verbal contract by a clear preponderance of evidence. *Green* v. *Dietrich*, 636.

2. So after the lapse of many years, and after the death of the party so purchasing, the testimony to establish a verbal contract that the purchase was made for another, should be of the most satisfactory character, and evidence of the admissions and statements of the party, in casual conversations, shown after his death, are too unreliable to justify a decree divesting the title of his heirs long after his death. Ibid. 636.

3. *Taking title to hold as an indemnity.* A contract was made for the purchase of a lot of ground for $900, $100 of which was to be paid down, and eight notes given for the balance, bearing six per cent interest. The purchaser being unable to make the first payment, induced his father to advance the same, and give his individual notes for the balance, and the contract for the deed was made directly to the father as a security for the money so advanced, and to indemnify him against liability on his notes for the remaining purchase money. The son afterward repaid his father the sum so advanced, went into possession of the lot, paid the

TRUSTS AND TRUSTEES. WHETHER A TRUST EXISTS. *Continued.*

taxes, and made valuable improvements thereon, and paid the interest on the notes. It was *held*, that the father held the bond for the deed in trust for the son. *Powell* v. *Powell*, 329.

SPECULATING IN TRUST FUND.

4. *A court of equity will not permit a trustee to speculate in the subject matter of his trust.* If he purchases an outstanding claim against the trust fund, the transaction will be treated as a payment only, and he will be allowed only what he paid for it. *Rankin* v. *Barcroft & Co. et al.* 441.

ACCOUNTING BY A TRUSTEE.

5. *By whom it may be required—right of a surety* On bill by a surety on the bond of a trustee, against the trustee, to compel him to render to the court a report of his acts, including his receipts and disbursements, or his debits and credits, where the *cestuis que trust* are not made parties, there is no error in the court refusing to pass upon the report and state the account, as such a statement of the account would not conclude them. *Ridgeway* v. *Potter*, 457.

RESULTING TRUST.

6. *When it arises.* Where there is an express trust, there can not be a resulting or implied trust; and in case of a voluntary conveyance, no resulting trust can arise in favor of the grantor. *Stevenson* v. *Crapnell et al.* 19.

7. *When it arises—and in what proportion.* Where a party receives money of another, to be invested in the purchase of land, and pays out the same, with other money of his own, in a purchase, taking a deed in his own name, he will hold the land so acquired in trust for the person whose money he has so used, in the proportion it bears to the entire consideration paid. *Springer* v. *Springer*, 550.

8. *Evidence to establish after great lapse of time.* The evidence to establish a resulting trust after the lapse of fifteen or sixteen years, and especially after many of the principal witnesses having knowledge of the facts are dead, should be of the most satisfactory kind. If the evidence fails to satisfy the court that the money paid for the land was that of the party seeking to establish the trust, no resulting trust can be declared. *Heneke et al.* v. *Floring*, 554.

9. Where a resulting trust is sought to be established after the lapse of many years, on the ground that complainant's money was used in paying for the same, and that complainant's wife, by conspiracy and fraud, had the conveyance made to her imbecile son by a former marriage, it is incumbent on the plaintiff to establish these facts by very clear and satisfactory evidence, and failing to do so, he can have no relief. Ibid. 554.

10. *Laches—from what time to be computed—as against the establishment of a resulting trust.* See LIMITATIONS, 7.

TRUSTS AND TRUSTEES. *Continued.*

STATUTE OF FRAUDS.

11. *Reserving a verbal trust by a grantor.* See STATUTE OF FRAUDS, 3.

12. *Interposing Statute of Frauds.* See PLEADING, 9.

USAGE.

EXPLAINING OR VARYING TERMS OF CONTRACT.

To what extent admissible in evidence. See CUSTOM—USAGE.

USURY.

WHAT CONSTITUTES USURY.

1. *As to an agreement to pay taxes on land mortgaged, in addition to interest.* A person borrowed $2500 on several years' time, and to secure its payment, with interest, conveyed to the lender eighty acres of land, taking back a written contract for a reconveyance on payment of the principal and ten per cent interest annually, that rate being the highest then allowed by law to be contracted for, with $20 yearly for taxes on the land, making $270 annually, and the proof showed that only $250 was in fact paid as interest, and that on payment of that sum, and producing a receipt for the taxes of such year, he was credited with $270. It was *held*, the transaction was not usurious, and that the $20 was but a guaranty for the payment of the taxes, which were chargeable against the mortgagee by reason of the legal title being in him. *Kidder* v. *Vandersloot*, 133.

BUILDING AND LOAN ASSOCIATION.

2. *Act of 1872—loans made according to its provisions not usurious.* See BUILDING AND LOAN ASSOCIATION, 1.

VACATION.

POWERS OF CIRCUIT JUDGE. See JUDICIAL POWER, 1.

VARIANCE.

ALLEGATIONS AND PROOFS.

1. *In cases in chancery—when variance not fatal.* See PLEADING AND EVIDENCE, 1, 2.

2. *Decree without amending bill—not justify a reversal.* See PRACTICE IN THE SUPREME COURT, 9.

VENDOR AND PURCHASER.

PURCHASER.

1. *Right of purchaser to buy in outstanding superior title.* The purchaser of land, while in possession under his contract of purchase, is under no obligation to maintain his vendor's title, and the law does not forbid him from buying an outstanding title to the premises, and asserting it against his vendor. *Green* v. *Dietrich*, 636.

VENDOR AND PURCHASER. PURCHASER. *Continued.*

2. So where the purchaser entered into possession under an agreement that the purchase money was not to be paid unless the vendor should, within three years, make him a warranty deed conveying a perfect title, and in case of failure to make him such conveyance the purchaser was to remain in possession of the premises for the period of three years, and pay a reasonable rent for the time he could hold peaceable possession, and before the expiration of the three years he acquired the title from other parties, it was *held*, that there was nothing in the relation of the parties, under the original contract or otherwise, that prevented the purchaser from yielding to the superior title and purchasing the same, and in that way secure his peace. *Green* v. *Dietrich*, 636.

RESERVATION CLAUSE IN DEED.

3. *Purchaser assuming incumbrance—of the lien created thereby in favor of holder of the incumbrance.* See LIENS, 1.

CONTRACT CONSTRUED.

4. *Right of buyer to determine as to the quality of goods purchased and delivered.* See CONTRACTS, 5.

LANDLORD AND TENANT.

5. *Whether the relation exists—as between vendor and purchaser.* See LANDLORD AND TENANT, 1.

VENUE.

IN CRIMINAL CASE.

What proof regarded as sufficient. See CRIMINAL LAW, 1.

VESTED RIGHTS.

VILLAGE ORDINANCE.

When it vests rights—right to repeal. See MUNICIPAL CORPORATIONS, 16.

WAGER.

LIFE INSURANCE.

When in the nature of a wager. See INSURANCE, 6.

WAIVER.

INSURANCE PREMIUM.

1. *Waiver of cash payment of premium and dues by taking an order—notice.* See INSURANCE, 10.

LIFE INSURANCE.

2. *Of proof of death before suit, by act of mutual benefit association.* See INSURANCE, 2, 3.

WAREHOUSEMAN.

DELIVERY TO WRONG PERSON.

1. *Warehouseman's liability to the owner.* Where a warehouseman receives grain, he will be liable to the party storing the same if he delivers it to any other person without authority from the owner, unless the latter has done some act or acts to estop him from denying permission to make such delivery. *Peoria and Pekin Union Ry. Co.* v. *Buckley et al.* 337.

2. *Delivery of grain on a sampler's ticket—whether a protection to the warehouseman.* It is the usual custom on the board of trade in Peoria, when grain has been consigned to a dealer, and the railroad cars in which it was shipped remain upon the track, to cause the grain to be sampled by a person appointed by the board of trade for that purpose, the sampler giving to the consignee a ticket stating the kind and grade of the grain inspected, and the consignee named, with a sample of the grain. It appeared also to have been the custom, when a sale was made on the board, for the seller to mark on the sampler's ticket, the name of the purchaser, and the price, and give the same to the purchaser, with an order, either verbal or written, to deliver the grain sold at such place as the buyer may designate. It was *held*, that a warehouseman, to whom a shipment of grain had been delivered on the order of one who had purchased under the conditions mentioned, was not authorized to deliver the grain to such purchaser merely upon the presentation of the sampler's ticket with the name of the purchaser and the price marked thereon, without any order from the seller. The sampler's ticket was not a warehouse receipt, in the sense that term is used in the statute. Ibid. 337.

WATER WORKS.

IN CITIES AND VILLAGES.

Of municipal powers in respect to their construction and maintenance—act of 1873, in its application to cities acting under special charters. See MUNICIPAL CORPORATIONS, 14, 15.

WILLS.

PROBATE OF WILLS.

1. *Within what time allowed.* There is no statute or law in this State limiting the time of probating a will to any given number of years. In this case, a will was admitted to probate thirteen years after the death of the testator, and letters of administration which had been previously issued on his estate were revoked. *Rebhan* v. *Mueller*, 343.

2. *The statute construed as to probate "without delay."* The statute requiring the court to receive the probate of wills "without delay," is not to be construed so literally as to make it the duty of the court to proceed immediately in the probate of a will when presented. Its meaning is no

WILLS. PROBATE OF WILLS. *Continued.*

more than that the court shall proceed without unreasonable delay. *The People ex rel. Storey* v. *Knickerbocker*, 539.

3. *Discretion of court as to time of hearing proof of will.* The probate court is invested with a reasonable discretion as to advancing or postponing cases, and may properly, in the exercise of such discretion, during the pendency of an appeal from its order refusing the probate of a paper purporting to be a last will, stay and postpone the hearing of an application to probate another paper of a prior date claimed as the will of the same person; and the exercise of such discretion, when not abused, will not be interfered with by *mandamus*. In such case the good faith of the party appealing from the order refusing probate is not a matter of inquiry. Ibid. 539.

4. *Probate of will as a judicial act.* Under the present legislation, the probate court exercises a judicial, and not a mere ministerial, power, in the probating of a will, or in granting a motion for a postponement of the hearing of an application to admit a will to probate. Ibid. 539.

5. *Mandamus—matters involving discretion—of time of receiving probate of a will.* See MANDAMUS, 5.

LETTERS OF ADMINISTRATION.

6. *Revocation of letters on finding a will—as to acts prior to the revocation.* See ADMINISTRATION OF ESTATES, 1.

WITNESSES.

COMPETENCY.

1. *Of widow, on behalf of herself and the heirs—on bill to establish a trust in favor of the estate.* On bill filed by the widow and heirs of a deceased person to establish a trust alleged to have existed in favor of the deceased in his lifetime, and enforce the same for the benefit of herself and the heirs, the widow is a competent witness in her own behalf, and in behalf of the heirs, as to all matters affecting the transaction of which she had personal knowledge. *Powell* v. *Powell*, 329.

2. *Of defendant in suit by widow and heirs to establish and enforce a trust.* On bill by the widow and heirs of a deceased person to establish and enforce a trust in real estate, the defendant is not a competent witness to testify in his own behalf to anything but matters falling within the exceptions to section 2, chapter 51, of the Revised Statutes of 1874. Under these exceptions, where witnesses in behalf of the complainants have testified to conversations, admissions or transactions of such defendant, he is competent to testify as to the same conversations, admissions or transactions. Ibid. 329.

3. *Of wife for the husband.* But such a case is not one wherein the wife of the defendant is rendered a competent witness, by the statute, to testify in his behalf. There was no element of agency on her part in connection with the transaction. Ibid. 329.

WITNESSES. COMPETENCY. *Continued.*

4. On bill to set aside a conveyance made by a judgment debtor as being fraudulent as to creditors, the wife of the grantee defendant is not a competent witness for him, to sustain the alleged *bona fides* of the conveyance. *Gordon et al.* v. *Reynolds*, 118.

5. *Grantor in deed of assignment for the benefit of creditors.* A debtor who makes a voluntary assignment of his property for the benefit of creditors, is a competent witness, on the trial of an interpleader interposed by his assignee in an attachment suit against him and another, to show that he alone owned the property attached, and therefore that it belonged to the assignee, and was not subject to attachment. *Zimmerman* v. *Willard et al.* 364.

CREDIBILITY.

6. *As of one charged with crime, when testifying in his own behalf.* A clause in an instruction, on the trial of a party upon a charge of murder, who had testified in his own behalf, after reciting certain facts, was to this effect: "And if, from all such facts and circumstances in evidence, the jury believe that he (the defendant) has testified falsely upon any material point in issue in the case, then they have the right to entirely disregard his evidence, except so far as it may be corroborated by other credible proofs or circumstances in evidence." The instruction was held erroneous, in omitting the essential element that the witness had willfully and knowingly sworn falsely. *Panton* v. *The People*, 505.

IMPEACHMENT.

7. *By proof of inconsistent statements.* Declarations and statements of a witness inconsistent with his testimony, are not admissible in evidence to impeach him, unless where his testimony relates to matters material to the issues, nor then unless his attention has been called to the time, place and persons when, where and to whom he had made his supposed declarations. *Gordon et al.* v. *Reynolds*, 118.

8. *Time for offering impeaching evidence — discretion.* Where plaintiff's witness is asked certain questions on cross-examination, for the purpose of laying a foundation to impeach him, and he is again called by the plaintiff in rebuttal, after the defendant has closed his testimony, and asked as to other matters merely in rebuttal, it is a matter of discretion with the court at that stage of the case to allow the defendant to introduce evidence to impeach the witness. Ibid. 118.

WORDS AND PHRASES.

"SOUNDING IN DAMAGES."

1. As used in section 8 of the Appellate Court act, these words were intended to include all cases, whether the action is *ex contractu* or *ex delicto*, when the damages are not susceptible of direct proof. *Bradshaw* v. *Standard Oil Co.* 172.

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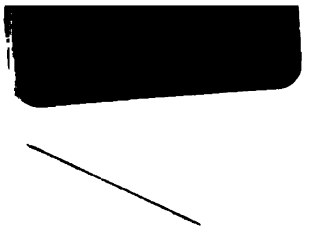
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